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REPORTS

CASES ARGUED AND DETERMINED

SUPREME COURT

MONTANA TERRITORY

THE REPORTS OF THE SUPREME COURT OF THE TERRITORY OF MONTANA, FROM 1864 TO 1889.

BY  
THOMAS M. CANNON,  
CLERK.

VOL. IV.

CLARKSON, N.M.

PRINTED BY THE TERRITORY OF MONTANA, 1889.





REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF  
MONTANA TERRITORY,

FROM  
THE JANUARY TERM, 1881, TO AND INCLUDING PART  
OF THE JANUARY TERM, 1883.

BY  
CORNELIUS HEDGES,  
REPORTER.

VOL. IV.

SAN FRANCISCO, CAL.:  
BANCROFT-WHITNEY COMPANY, PUBLISHERS.  
1884.

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JUDGES  
OF  
THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

HON. DECIUS S. WADE,<sup>1</sup> CHIEF JUSTICE.

HON. WILLIAM J. GALBRAITH,<sup>2</sup>  
HON. EVERTON J. CONGER,<sup>3</sup> } ASSOCIATE JUSTICES.

---

ISAAC R. ALDEN, Clerk.

CORNELIUS HEDGES, Reporter.

ALEX. C. BOTKIN, United States Marshal.

JAMES L. DRYDEN,  
FRANK M. EASTMAN, } United States Attorneys.  
WILLIAM H. DE WITT, }

---

<sup>1</sup> Appointed March 17, 1871.

<sup>2</sup> Appointed July 1, 1870.

<sup>3</sup> Appointed March 2, 1880.

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*Licensed and admitted since the August Term, 1880.*

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# RULES OF THE SUPREME COURT.

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## COMPILED FROM THE RECORDS.

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### RULE FIRST.

In all cases where an appeal is perfected and the statement (if there be one) settled twenty days before the commencement of the next succeeding term of this court, the transcript of record shall be filed on or before the first day of such term.

### RULE SECOND.

If the transcript of the record is not filed within the time prescribed, the appeal may be dismissed, on motion, upon satisfactory evidence of such omission. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the respondent.

### RULE THIRD.

On such motion to dismiss the appeal there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from; the date of its rendition; the fact and date of the filing of the notice of appeal; the fact and date of filing the undertaking on appeal; the fact and time of settlement of the statement, if there be one, and also that the appellant has received a duly certified transcript, or that such transcript has not been requested by appellant; or, if requested, that appellant has not paid the fees therefor, if such payment has been demanded.

### RULE FOURTH.

All transcripts of records hereafter sent to this court shall be on paper of uniform size, according to a sample to be furnished by the clerk of this court, with a blank margin one and a half inches wide at the top, bottom and side of each page, and all pleadings, proceedings and evidence shall be chronologically arranged, and the pages of the transcript shall be numbered, and but one side of the leaves shall be written upon.

## RULE FIFTH.

Each transcript shall be prefaced with or have annexed an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and shall have blank or fly-sheet covers.

## RULE SIXTH.

The transcript shall be fastened together on the left side of the pages, so that the same may be secured and every part conveniently read.

## RULE SEVENTH.

The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

## RULE EIGHTH.

The party filing the transcript may, if he so desire, have the same printed, but the expense of printing shall not be allowed or taxed as costs.

## RULE NINTH.

No transcript which fails to conform to the requirements of these rules shall be filed by the clerk.

## RULE TENTH.

The transcript, on appeal from a final judgment, shall contain copies of the notice of appeal; the undertaking executed by appellant on the appeal; the pleadings on which are formed the issues tried in the cause; the statement, if there be one, and such other parts of the judgment roll as are necessary to present or explain the points relied on and no more.

On appeal from a judgment rendered on an appeal or from an order, the transcript shall contain copies of the notice of appeal, the undertaking or undertakings filed by appellant, the judgment or order appealed from, and of the papers used on the hearing in the court.

## RULE ELEVENTH.

The appellant shall be charged with the duty of having the transcript perfected in accordance with the statute and these rules: *Provided*, that if it shall appear to the satisfaction of the court that the appellant has filed his *præcipe* in time with the clerk of the court below, directing the preparation of the transcript and specifying what portions of the record the same shall contain, then, in case the transcript shall be imperfect and shall not conform to the requirements of the *præcipe*, and sufficient reason for such non-conformity does not appear, the appeal shall not be dismissed, and on motion of the appellant a rule shall



be entered upon the clerk below to correct the transcript within such time as may be allowed by the court below.

RULE TWELFTH.

For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and, upon good cause shown, obtain an order that the proper clerk certify to this court the whole or part of the record, as may be required. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the alleged error or defect.

RULE THIRTEENTH.

Proof of service of notice of appeal on the respondent may be made by affidavit, and in all cases proof of service of such notice or waiver thereof shall be filed in this court five days at least before the commencement of the term to which the appeal is taken.

RULE FOURTEENTH.

Exceptions to the transcript, statement, undertaking on appeal, notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the errors assigned, must be taken at least one day before the day on which the cause may be set down for hearing, and must be noted in writing and filed at least one day before the argument, unless the appellant otherwise consent; but in all cases such objection must be presented to the court before the argument on the merits.

RULE FIFTEENTH.

Upon the death or disability of a party, or transfer of his interest in the suit, pending an appeal, such fact shall be suggested in writing to the court, and if the cause of action survive or continue, upon motion of the legal or personal representative of such party, or of any party to the record, an order shall be made substituting such representative in the cause, and the same shall proceed as in other cases.

RULE SIXTEENTH.

The calendar of each term of this court shall consist only of those causes in which the transcript shall have been filed in this court five days before the commencement of the term, unless by written consent of the parties: *Provided*, that all cases in which the appeal is perfected, as provided in rule first, and the transcript is not filed five days before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript during the first week of the term.

## RULE SEVENTEENTH.

Causes shall be placed on the calendar in the order in which the transcripts are filed, and, except when brought to hearing upon notice or agreement of the parties, shall be disposed of in the order in which they appear upon the calendar.

## RULE EIGHTEENTH.

The appellant shall file with the transcript a brief of his points and authorities. The respondent shall file with the clerk his points and authorities at least one day before the time the cause is assigned for hearing. The appellant and respondent shall furnish to each other a copy of their briefs at least one day before the time set for the hearing of the cause, and a copy thereof to each of the justices; or either party may file one copy with the clerk, who shall cause the requisite copies to be made; and in case either party shall fail to furnish such copy to the opposite party, as required by this rule, he shall be deemed to waive his right to argue such cause orally, except by consent. No brief not filed in accordance with this rule will be considered by the court, except after at least one day's notice of the filing of the same to the opposite party, who shall have such time as may be allowed by the court, after the filing thereof, to file his reply thereto. References in the brief to matters in the transcript shall be referred to by page and line, and shown by marginal notes on the brief.

## RULE NINETEENTH.

When briefs or arguments are filed, one copy shall be delivered to the adverse party, one to each of the justices and one to the reporter.

## RULE TWENTIETH.

No more than two counsel will be heard upon a side, and not over one and a half hours on a side for argument will be allowed, unless permission be asked and allowed before the argument commence.

## RULE TWENTY-FIRST.

The records and reports must, in all cases, show whether a decision was made by a full bench, and which of the judges, if either, dissented therefrom.

## RULE TWENTY-SECOND.

When the court takes a case under advisement it shall file its opinion at or before the next term thereafter.

## RULE TWENTY-THIRD.

In any case, if the court is satisfied from the record that the appeal was taken for delay, such damages shall be awarded as may, under the



circumstances, be proper, and as shall tend to prevent the taking of appeals for delay.

**RULE TWENTY-FOURTH.**

**Appeals in criminal cases shall take precedence of all other business.**

**RULE TWENTY-FIFTH.**

When a judgment of the supreme court is rendered, such judgment and the opinion, when finally corrected, must be recorded, and a certified copy of the judgment, with proper instructions, must be forthwith remitted to the clerk of the district court in which the judgment appealed from was rendered, and a copy of the opinion shall be remitted upon application of either party and payment of the costs thereof within ten days after the close of the term at which such opinion was filed.

**RULE TWENTY-SIXTH.**

In case any justice of this court, while holding a district court, shall refuse to allow an exception or to certify to a statement in accordance with facts, upon presentation to this court, or to any two justices thereof, in vacation, of a petition verified by the affidavit of any person aggrieved thereby, or by the attorney of such person, this court, or such justices thereof, shall, if sufficient reason appear therefor, sign an order granting leave to such person to prove the facts in relation to such exception or statement. Such proof shall be made by deposition taken after three days' notice to the opposite party, or his attorney, of the time and place of taking the same, which shall contain a copy of the order granting such leave, and within ten days after the taking of such depositions shall be concluded the opposite party may, after like notice and in like manner, take depositions of witnesses in relation thereto. Such depositions shall be taken and certified before the same persons and in the same manner, in all respects, as is provided by law in the case of depositions taken within this territory.

**RULE TWENTY-SEVENTH.**

All motions for rehearing shall be in writing, and filed within three days after the judgment is rendered or order made, and during the term at which the judgment or order is rendered or made.

**RULE TWENTY-EIGHTH.**

No transcript or paper filed in a cause shall be taken from the court room or clerk's office except by written order of the court or one of the justices.

**RULE TWENTY-NINTH.**

The party filing the transcript shall be primarily liable for costs, and at the time of the filing shall pay to the clerk \$25, which shall be

applied to the payment of fees. In no civil case shall the clerk be required to remit the final papers until the costs accrued in this court are paid.

#### RULE THIRTIETH.

Upon the receipt by the clerk of this court of a mandate from the supreme court of the United States in any case at law or in equity, theretofore taken from this court by writ of error or appeal to said supreme court, it shall be the duty of said clerk forthwith to issue under his hand and the seal of this court a *remittitur* to the district court of the district and county in which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper; and the said *remittitur* shall also contain therein a recital *in hæc verba* of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such *remittitur*.

#### RULE THIRTY-FIRST.

When a judgment or order from which an appeal is taken is reversed, the *remittitur* shall be accompanied by a certified copy of the written opinion of this court in the case.

#### RULE THIRTY-SECOND.

Unless made a part of the record in the court below by a bill of exceptions, or unless, upon an inspection of the judgment roll, some question of error arises upon the formal parts of pleadings, motions and other papers in the court below hereinafter designated, such formal parts of pleadings and papers shall be omitted in making records to be sent to this court, viz.:

*First.* The title of the cause of all papers filed subsequent to the complaint or indictment, and such omission shall be indicated by the words, "Title of Cause."

*Second.* In depositions, all except the questions and answers of witnesses, with their signature; and as to these, they shall be omitted when the respective attorneys can agree upon the substance of the evidence in a form more brief, in which event such substance of the evidence shall be inserted in lieu of the questions and answers, and so indicated by the clerk.

*Third.* In deeds, mortgages, contracts and other exhibits, which are made a part of the record, by pleadings, bills of exceptions or statements on motions for new trials or on appeal, the indorsements thereof, and also the certificate of acknowledgment thereof; and the same may be indicated by the word "acknowledged," or the word "recorded," as may be proper and according to the fact.

*Fourth.* All indorsements made by officers on papers in the subordinate courts and tribunals, except the returns of sheriffs, deputy

sheriffs, marshals and deputy marshals, or persons appointed to perform their services or the services of some of them. Whenever, in the judgment of this court, any of the writings herein ordered to be omitted shall be deemed useful, it may order them to be certified to this court.

**RULE THIRTY-THIRD,**

The clerk will not insert upon the docket or trial calendar of this court the name of any attorney or counselor at law as representing any party in this court, except upon an appearance entered by such attorney and counselor for that purpose; but this rule shall not apply to the district attorneys of the several districts of the territory, nor to the attorney of the United States in cases with which they are officially identified. Upon filing any transcript on appeal, the attorney or attorneys representing the party filing the same shall enter his or their appearance for such party, and the attorney or attorneys representing the opposite party shall enter their appearance for such party before the case is set down for hearing; and until the entry of the appearance of counsel upon the opposite side, where service upon the party is impracticable, service on the clerk of this court of all briefs or motions looking to a correction or perfection of the record shall be sufficient service.

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**TERRITORY OF MONTANA—SS.**

I, ISAAC R. ALDEN, clerk of the supreme court of Montana territory, hereby certify the foregoing to be a correct copy of the rules adopted by said court for the government of its proceedings, and that the same are now in force.

Attest my hand and official seal hereunto affixed the 6th day  
[SEAL.] of December, A. D. 1880.

**I. R. ALDEN, Clerk.**





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CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT,  
AT THE  
JANUARY TERM, 1881.

---

KING, appellant, *v.* NATIONAL M. & E. Co., respondent.

**FOREIGN CORPORATION — *Effects of failure to record charter — May do business — May plead statute of limitations.***— The law requiring foreign corporations doing business in this territory to first file charter or act of incorporation, declares the failure to do so to be wilful negligence, and fixes the penalty therefor to be, not disqualification to do business in the territory, but simply relieves the party suing such corporation from the necessity of proving the incorporation, except by reputation.

A foreign corporation doing business openly, without fraudulent concealment, with an office and a managing agent or superintendent within the territory, though it has not filed its charter, articles of incorporation, or copy thereof, for record as required, is not a foreign resident within the meaning of section 50, Code of Civil Procedure, and a personal judgment could be rendered against it, and it could plead the statute of limitations.

Sections 46 and 47, page 419, Codified Statutes of 1872, construed.

• *Appeal from Third District, Lewis and Clarke County.*

GALBRAITH, J. The record in this case discloses the fact that there was a trial to a jury, in which the plaintiff produced and examined witnesses in support of his complaint and presented his case. None of the evidence thus produced, however, appears in the transcript. The rec-

ord further discloses that thereupon a motion of non-suit was made and sustained. Although the appellant excepted to the action of the court in sustaining the motion of non-suit, he does not, as appears from his brief, insist or rely upon this exception to reverse the judgment. But this exception, even if insisted upon, unless the evidence was before us, could not be considered. There being no statement of the evidence in the transcript, it will be presumed not only that the non-suit was properly granted, but also that the plaintiff did not sustain his complaint or make out a *prima facie* case thereon. He must, therefore, be conclusively presumed to have had no cause of action. But if he had no cause of action, how can he now complain of injury done him by sustaining the motion to strike out portions of his complaint. How can he, an uninterested party, challenge the right of the defendant to do business in this territory or to plead the statute of limitations? He is, as appears by the transcript, uninjured and unharmed by the action of the court in relation to his motion, and for this reason alone, this court should not disturb the judgment. The above reasons would be sufficient upon which to base our decision in this case, but the questions presented in the appellant's brief, and relied upon by him for a reversal of the judgment, are important and entitled to a brief consideration.

They are, first, the right of the respondent to do business in this territory, it being a foreign corporation and having failed to file a copy of its charter as required by law. Second, the right of a foreign corporation to plead the statute of limitations in this territory.

In relation to the former, it is claimed by the appellant that by virtue of sec. 46, p. 419, of the Codified Statutes of this territory, the respondent was, up to the time of the institution of this action, incapable of and disabled from carrying on, conducting or transacting any business in this territory, or of maintaining and keeping a business

or managing agent or superintendent qualified or authorized to carry on, transact or conduct any business for the said respondent, and that by reason thereof the said respondent was disabled and incapable of purchasing, acquiring or holding any property, or of doing business of any kind, nature or description whatever in said territory.

This section, so far as it is necessary for the purposes of this inquiry to quote therefrom, reads as follows: "That hereafter all mining, manufacturing and other companies or incorporations, incorporated by the legislature of any state or territory of the United States, or incorporated under the general laws of incorporation of any state or territory, other than this territory, and incorporated for the purpose of carrying on or doing business of any kind, nature and description whatever in this territory, shall, before they proceed to do business under the charter or certificate of incorporation in this territory, file for record with the secretary of the territory, and also in the office of the recorder of the county in which they are carrying on business, the charter or certificate of incorporation of said company or corporation, duly authenticated, or of the copy of said charter or certificate of incorporation."

This section and section 47, which follows, constituted, when first enacted, a separate and distinct act of the legislature, which was passed in 1867, and although reenacted in the Codified Statutes of 1872, yet it is to be construed as when at first passed in 1867, and as if a single and separate act. The act of 1867 contained but two sections, one (1) and two (2); section 1 thereof being identical with section 46, and section 2 with section 47 of the general incorporation act, as contained in the Codified Statutes. Section 47 of the general incorporation act is as follows: "That any company or corporation incorporated as in section 1 of this act, that shall neglect or refuse for the period of thirty days to file for record their charter or certificate of incorporation, or copy thereof, with



the secretary of the territory and county recorder of the county wherein such business may be carried on, shall be deemed guilty of wilful negligence on the part of said company or corporation, and thereafter any person or persons maintaining or prosecuting any civil action in any court of this territory against said company or corporation so neglecting or refusing to file for record their charter or certificate of incorporation, or copy thereof, with the secretary of the territory and county recorder, heretofore provided, shall not be held to prove on trial the incorporation of said company or corporation by the original charter or certificate of incorporation, or act of incorporation, but the same may be proved by general reputation."

From the history of these sections, it will be observed that where reference is made therein to "section 1 of this act," or the words used are, "as heretofore provided," section 46 of the general incorporation act, and it alone, is thereby indicated. The above sections, 46 and 47 of the general incorporation law, being therefore a single act, and expressing the legislative will in regard to the subject matter thereof, must be construed together. The language used by the court in the case of *Bradbury v. Wagenhart*, 54 Pa. St. 180, and cited by appellant, is in harmony with our statute in regard to construction—section 513 of the Code of Civil Practice,—and affords a simple rule of interpretation of legislative enactment and one applicable to this case. The language is as follows: "Whatever may have been the legislative thought, no ambiguity exists as to what they have said; and when the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith." Applying this rule of interpretation to these sections, constituting, as we have seen, a single act of the legislature, we are led to conclude that section 46, although its language is mandatory in its character, and requires of foreign corporations the performance of the acts therein mentioned, yet section 47 thereof prevents it

becoming a statute of absolute prohibition, and prescribes the consequences which shall result from a failure to comply with the provisions of section 46. The plain intent of the legislature by enacting this statute is to require of foreign corporations that before they proceed to do business under their charter or certificate of incorporation, that a copy thereof shall be filed as provided therein; and upon failure so to do, that although they may do business in the territory under such charter or certificate, such failure shall be deemed wilful negligence upon their part; and persons maintaining or prosecuting civil actions against them are not required to prove, on the trial, their incorporation by the original charter, certificate or act of incorporation, but may prove the same by general reputation. Section 47, therefore, simply indicates the consequences, and those only, which shall result from a failure to comply with the provisions of section 46. These two sections constitute a single act of the legislature, the first section of which prescribes the conditions upon which foreign corporations may carry on business in this territory, and the second section of which points out and limits the consequences, and those alone, as the penalty, and that alone, which shall result from a failure to comply with those conditions. The maxim, "*Expressio unius, exclusio alterius*," is eminently applicable to and decisive of this question. Foreign corporations are therefore, in our opinion, not prohibited from doing business in this territory by failure to comply with the requirements of section 46 of the general incorporation law.

The second question raised by the appellant is in relation to the right of a foreign corporation in this territory to plead the statute of limitations. It is urged by the appellant that the respondent, being a foreign corporation, is therefore a non-resident and within the meaning of the phrase: "person when he is out of the territory," contained in section 50 of the Code of Civil Procedure.

This section, however, must be interpreted in accordance with the intention of the legislature and in view of the reason for its enactment. The plain intention of the legislature is to preserve the right of action against a non-resident for the same period that the same right might be preserved against one within the jurisdiction of the courts of the territory. The principal reason for its enactment is that a personal judgment cannot be had against a non-resident of the territory, as he is without the jurisdiction of its judicial tribunals.

It will be seen from what has been held in a foregoing part of this opinion that a foreign corporation which has failed to file its charter or certificate of incorporation, or a copy thereof, as required by section 46 of the general incorporation act, is not thereby prohibited from doing business in this territory. It also appears from the record in this case that "prior to," and "ever since," the 28th of July, 1867, the respondent had continuously carried on the business for the express purpose for which it was incorporated in the county of Lewis and Clarke, which was done publicly in its corporate name; that during said period it had an office in said county where the above business was transacted; and also "a duly authorized and accredited business, managing agent and superintendent residing therein, upon whom process, issued from any court of this territory against the defendant, could have been served." Also that the respondent "has owned and been possessed of large amounts of real estate and personal property within this territory." It was held by Chief Justice Waite in *Ex parte Shellenberger*, 96 U. S. 377, that a foreign corporation "may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws. Under such circumstances, it seems clear that it may, for the purposes of securing business, consent to be 'found' away from home for the purposes of suit as to matters growing out of its transactions."



In the case of *R. R. Co. v. Harris*, 12 Wall. 65, Mr. Justice Swayne uses this language: "If a corporation do business in a foreign territory, it will be presumed to have consented to be sued there."

The transcript in this case does not disclose how service was had upon the respondent, as it does not contain a copy of either the summons or return thereof, or any other method of service. But as the facts above stated in relation to its having an agent upon whom process might have been served, do appear in the record, it will be presumed that service of the summons was had upon such agent. We have therefore, in this case, a foreign corporation (the respondent) within the jurisdiction of the district court, and during the period above stated, doing the business for which it was incorporated, openly and publicly, and for this purpose having an office within such jurisdiction, and an agent and superintendent residing therein, and also owning and being possessed of real and personal property within the territory. Applying, then, to this respondent, under such circumstances, the language of Chief Justice Waite and Justice Swayne as above quoted, when its agent, residing within the jurisdiction of the court, was properly served with process, we must conclude that a judgment rendered against it would be a personal judgment, within the meaning of a personal judgment as against a corporation.

But even if the presumption would not be that respondent's agent was properly served with process as above stated, nevertheless, when it appears by counsel throughout the entire proceeding, as appears by the record, and made no objection to the manner of service, which must be the presumption where no objection appears, we are of the opinion that a judgment rendered against it, under such circumstances, would be a personal judgment. Therefore, a foreign corporation doing business under the circumstances shown by the record, would be within the intent and meaning of section 50 of the Code of Civil Procedure.

Again, section 50 of our Code of Civil Procedure is identical with that of California, in relation to the same subject matter. The supreme court of that state, in the case of *Lawrence v. Ballou*, 50 Cal. 258, says in relation to the rights of a foreign corporation, under said section: "that when a foreign corporation has a managing agent in this state, exercising openly his authority as such and without fraudulent concealment, the corporation is within the intent of the statute of limitations, and the corporation may claim the benefit of the statute."

The transcript in this case discloses a state of circumstances comprehended within the language of this decision. We conclude, therefore, in relation to the second objection of appellant, that foreign corporations doing business in this territory, under the circumstances shown by the record in this case, may plead the statute of limitations.

Judgment affirmed with costs.

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**KLEINSCHMIDT ET AL., appellants, v. McANDREWS ET AL., respondents.**

PRACTICE.—An appeal from a decision of a district court sustaining a motion for non-suit and directing entry of judgment for defendant, should be by a statement on appeal, containing the evidence settled by the court in the presence of the parties. A statement on motion for new trial would be improper, for in such case there has been no trial proper.

Objection to the decision of the court, in such case, cannot, in the nature of things, be made till after such decision is rendered, and cannot be such an exception as defined by statute, and intended to be included in a bill of exceptions.

Evidence can only be made part of a judgment roll by being settled in a bill of exceptions.

On appeal from decision refusing non-suit, the evidence can be brought up either by bill of exceptions or statement on appeal, because in such case the rule is during trial and before final decision.

By an appeal from a judgment without statement nothing is brought

up, or is part of the record on appeal, but the judgment roll; nothing else will be considered.

No exceptions will be considered save such as are taken in the mode prescribed by statute.

A motion for non-suit under our statute is, like a demurrer to evidence under the old English procedure, purely a question of law for the courts.

The provisions of the Montana code regulating appeals and bills of exception are not in violation of organic act, section 9, but in accordance with powers therein delegated to the legislative assembly of Montana.

CONSTRUCTION OF STATUTE.—Sections of Code of Civil Procedure construed, 234, 241, 279, 281, 282, 284, 419.

*Appeal from Third District, Lewis and Clarke County.*

CHUMASERO & CHADWICK and SANDERS & CULLEN, for appellants.

This is an action brought to recover possession of certain goods, wares and merchandise which were taken from plaintiffs' possession by defendants; the taking being attempted to be justified under process of attachment against one N. E. Ingersoll, from whom the plaintiffs purchased, and, as they claim, acquired the possession.

The questions presented by the stipulation of the parties for decision were simply these:

1st. The ownership of the property in dispute, and who was entitled to possession.

2d. In whose possession the goods were when taken by the defendant McAndrews.

There was no question made on the trial of the cause as to the execution of the bill of sale by Ingersoll to plaintiffs, or that it was *bona fide*, and the evidence fully sustained the truth of those propositions.

The proof shows that the bill of sale was executed by Ingersoll and delivered to plaintiffs between nine and ten o'clock on the evening of the 29th of March, 1879. That it was executed in Helena, and that the property sold, being a stock of goods, wares and merchandise, were in a store owned by plaintiffs, at a place called Vestal, about twenty-three miles distant.



That immediately upon the execution and delivery of the bill of sale, plaintiffs handed it to one Wiseman, a person then in the employ of Kleinschmidt, with instructions to go immediately to Vestal and take possession of the property. That Wiseman, within an hour from the time of the execution of the bill of sale, started for Vestal, reaching there between three and four o'clock the next morning, being Sunday, and took full charge and possession of the property for plaintiffs, and remained in such possession until the 31st of March, on which day the defendant McAndrews, as sheriff, came to Vestal and claimed to levy on the goods under an attachment in favor of Bristol, and subsequently took the same into his possession.

On this evidence the court below granted a non-suit, upon the ground that the bill of sale was not accompanied by the *immediate* possession of the property.

In other words, that the bill of sale was not signed with one hand and the goods delivered simultaneously with the other.

The decision of the case hinges exclusively upon the construction and definition to be given of the word "immediate," as used in the statute. Laws 1872, sec. 15, p. 394.

We are not entirely without precedent or authority to guide us. It seems to us that the only true construction to be given to the word is that placed upon it by Chief Justice Murray, one of the ablest judges who ever occupied a seat on the bench of the supreme court of California. He says in *Samuels v. Gorham*, 5 Cal. 226: "By an immediate delivery is not meant a delivery instanter. But the character of the property sold, its situation and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time so as to meet the requirements of the statute." See, also, on construction of the same section of the statute, the case of *Stevens v. Irwin*, 15 Cal. 504.

showing that a strict literal construction should not be placed upon it. As was said in that case where the word "continued" was commented on: "If continued change of possession meant that the vendor never should have control over or use of them, it would lead to very unjust and very absurd results." See page 506. The definition of the word continued is "extended without interruption." It is, in the sense in which it is used in the statute, fully, in every respect, equivalent to the word "immediate."

We call attention, also, to Bump on Fraudulent Conveyances, page 171, where it is said: "It is not necessary that a change of possession should at all times accompany the transfer. If it follows within a reasonable time thereafter, that is, as soon as the nature of the property and the circumstances attending the transfer will admit it, it is sufficient." To support which the author cites a number of cases. See, also, pages 182-3, and cases cited.

The case of *Gandette v. Travis*, 11 Nev. 156 *et seq.*, is a case directly in point, and we call especial attention to it by the court.

In the case of *Walden v. Murdock*, 23 Cal. 540, it was held, notwithstanding the word "immediate" in the statute, that a *bona fide* sale of cattle running at large was not fraudulent as against creditors of the vendee, *merely* because the sale was not followed by an immediate delivery of the possession."

All laws must be reasonably construed; that is the unvarying rule of construction. A strict construction in that case would not have been reasonable, but would have led, as was said in the case in 15th Cal., "to very unjust and absurd results," as such construction has done in the case at bar. See, also, *Ex parte Ellis*, 11 Cal. 224; 1 Pars. Cont. 441-2, and notes; Pars. Merc. Law, 153; *Allen v. Parish*, 3 Ohio, 198; *Peake v. Canal Com'rs*, 3 Scam. 153; *People v. Admire*, 39 Ill. 251; *Jackson ex dem. Scofield*, 3 Cow. 89.

In every case where an apparently different construction has been given to the word "immediate," it has been where long intervals, in many cases extending to years, have elapsed between the sale and delivery of the property, and where the vendor has continued in possession.

Lord Bacon says in his argument in case of Revocation of Uses, Works IV, 253: "The word is often understood, not literally of a time succeeding without any interim or actual interval, but of an effectual and lawful time, allowing all the adjuncts and accomplements necessary to give an act full legal effect to be performed."

And so of the word "instanter," which means "without delay, forthwith." "But as used now it does not import an absolutely instantaneous succession, but only that which is comparatively so." Burrill's Law Dict. vol. 2, "Instanter." The words instanter and immediate are synonymous.

If the ruling of the court below in this case be sustained, it will be an utter impossibility ever to perfect a sale to be evidenced by writing, unless of some small portable article which the vendor could carry in his pocket.

If parties should go to an attorney's office, next door to the place where the property sold actually was at the time, and the bill of sale should be drawn, executed and delivered before leaving the attorney's office, and the parties pass out of the office to make actual delivery of the property sold, there would be an interval between sale and delivery, and if the vendor was at the time indebted to any other person, the construction given by the court below would render the sale void. Such would be the inevitable result. And it would tend to the destruction of the business of the country. No cattle, or sheep, or horses, on one of our ranges could be safely purchased; no transfer of title to goods in transit could be certainly relied on; scarce any business transaction could be safely made or entered into.



If one have a horse at a livery stable, and on the streets make sale of it, and receive his money, and then go to the stable and make delivery, or send an order to the stable-keeper to deliver, such sale would also be void as against a creditor. It would be the same with ponderable articles incapable of actual manual delivery.

Can any construction be more unjust and unreasonable than such an one, or lead to more absurd and ridiculous results? We insist that it is not only absurd, but contrary to public policy, and could never have been intended by the legislature.

Can it be that where a transaction is made in good faith, and every possible exertion is made to comply with the law, as in this case, that the very short interval of time between the actual sale and the taking of possession by the vendees of the property sold (an interval not exceeding five hours, in the night-time, after business hours, on the last day of the week, Saturday), during which interval a distance of twenty-three miles, at an inclement season of the year, over a mountainous road, was traveled, without any loss of time, and with the utmost possible expedition, by the agent and servant of plaintiffs, does not constitute "an immediate delivery" within the meaning of the statute? We believe not.

No appreciable length of time was permitted to elapse. It was an immediate reaching out of the arm to take possession on the sale being consummated. In the judgment of the court below, the length of the arm seems to have made the difference, and rendered the transaction fraudulent as to the creditors of Ingersoll. If possession could have been seized on the *instant*, the sale would have been valid. If the arm was not already stretched to its utmost length, at the exact instant when the signature to the bill of sale was completed, and placed upon the goods sold, then the *bona fide* effort of the vendee to realize the fruits of his purchase failed to perfect a *valid* transfer by a *few inches* in distance, which afforded a

chance for an intervening tick of the clock. The result being, that notwithstanding the plaintiffs were in actual, undisturbed possession of the property long before any other lien had attached, and had done all that the law contemplated and that human energy could accomplish, under the decision of the court below they are deprived of their property and left utterly without remedy.

There are some questions the answer to which is so palpable and plain that a lawyer oftentimes finds himself at an utter loss to find argument to maintain. Of such character is the one presented to the court, and it seems to us that the mere presentation of the question itself carries with it the answer, that the sale was good in law as well as in fact, and that the court below erred in granting the non-suit.

E. W. and J. K. TOOLE, for respondents.

1st. The bill of exceptions contained in the transcript in this cause cannot be considered by the court on this appeal. It could not, in the very nature of things, have been taken and filed until after the rendition of the judgment of non-suit. It is therefore no part of the judgment roll, and *cannot* be examined on an appeal from the judgment. See Laws 1877, Practice Act, secs. 279, 294. This is the only bill of exceptions provided for by the statute which becomes a part of the judgment roll. It is confined exclusively to the decision of the court upon a matter of law, must be before the final determination of the case, taken during the trial, and the point of the exception particularly stated. Section 281. The authorities all concur upon the proposition that, on an appeal from a judgment, the judgment roll alone can be considered.

2d. Nor will the court consider what purports to be a bill of exceptions, as a statement upon appeal. 1st. Because it is not made in the manner provided by the statute. 2d. It does not point out particularly the errors,

nor contain any assignment of errors, as required by section 419. See *Wetherbee v. Carroll et al.* 33 Cal. 549; *Kusell v. Sharkey*, 46 Cal. 3 *et seq.*; 10 id. 194; 11 id. 339, 391; 12 id. 280. 3d. Because the question as to whether or not the judgment of non-suit *was* or *was not* supported by the evidence, could only be heard upon an appeal taken within *sixty days* after its rendition. This is the real question in this case, and if it was *not actually necessary* to have moved for a *new trial* in the court below, in order to review the case upon its merits as to the sufficiency or insufficiency of the evidence to support the decision or judgment of the court, it was necessary that the appeal should have been taken within sixty days in order to give the court jurisdiction to determine this question. See Statutes of 1877, Civil Practice Act, sec. 408. This seems to us conclusive of this case, unless, from an inspection of the judgment *roll alone*, error can be found upon which the case should be reversed. There is no pretext even for this, and it is not claimed or urged by appellants that there is. A motion for a new trial should have been made. It is the only mode provided by the statute for reviewing a question of fact. The judgment of the court upon the sufficiency or insufficiency of the evidence may in every case be said in some sense to be a decision of a matter of law. When the facts are ascertained, the deductions therefrom may be denominated conclusions of law. Yet under our system of practice, when the functions of the court are invoked to pass upon the question of the sufficiency or insufficiency of the evidence upon which a verdict or the decision of a court or referee is based, the statute has pointed out but one way in which it can be done, and it is exclusive of all others. The statute that provided for the presentation of these questions by the mode pursued in this case, *i. e.*, by bill of exceptions, was repealed by Practice Act of 1877. Section 408, *supra*, provides the time within which the appeal shall be taken, and sections



284 and 285 the mode of presenting the question. See *Levy v. Gettleston*, 27 Cal. 685 *et seq.*; *Harris v. S. F. R. Co.* 41 id. 404; 27 id. 107; approved in 2 Blake, 555; *Allport v. Kelly*, 2 Mont. 343.

The court here will infer that all the evidence necessary to support the findings or decision of the court was introduced by the plaintiffs on the trial of the case below. This has been too often settled here, and elsewhere under statutes like ours, to require the citation of authorities to support it. The only mode of entertaining a bill of exceptions which was not taken at the trial and before its conclusion, so as to become a part of the judgment roll, is under the second subdivision of section 287 of the Practice Act. But even if taken and presented under this section of the Practice Act, that is, on a motion for a new trial, it does not show that it was all the evidence introduced on the trial. The decision of the court as matter of law upon the facts should be specified on motion for a new trial. See *Donahue v. Gallavan*, 43 Cal. 573 *et seq.*; *City of Stockton v. Cram*, 45 Cal. 247 *et seq.*; 1 Montana, 263 *et seq.*; 42 Cal. 444.

If appellants had offered certain evidence during the trial to support the issues on their part, and the court had excluded it, and thereupon a bill of exceptions had been signed and filed, then the bill would become a part of the judgment roll, and the court here would examine into it for error on an appeal from the judgment alone, without any statement on appeal or motion for a new trial. We earnestly protest against such an innovation of the Practice Act, and the settled construction it had received prior to its adoption here, as is sought to be accomplished by the appellants; and submit with confidence the position we have taken under the authorities cited. 1st. The court has no jurisdiction to look behind the judgment roll and examine into the merits of a bill of exceptions taken after the trial has terminated by the judgment of the court below. 2d. That there is no state-

ment on appeal, and the sufficiency or insufficiency of the evidence could not be considered if there was, nor could they entertain it under sec. 408, Civil Practice Act. 3d. No motion for a new trial was made so as to bring it within the provisions of the second subdivision of section 287 of the Practice Act.

3d. Should the court, however, be of opinion that it has jurisdiction upon an *appeal* from the *judgment* without any bill of exceptions forming a part of the judgment roll, any statement on appeal or motion for a new trial, so as to present properly the questions of law, or sufficiency of the evidence to justify the decision, and should feel disposed to determine the questions presented by the record for the purpose of settling an important proposition in this territory, then we say that section 15, in connection with section 16, page 394, Codified Statutes, is conclusive against the position of appellants. Section 15 provides that "every *sale*, etc., unless the *same be accompanied* by the *immediate* delivery of the *thing sold*, etc., *shall be conclusive* evidence of fraud, as against *creditors* of the *vendor*," etc. Section 16, in defining the class of persons against whom a sale *unaccompanied* by *immediate delivery* shall be *void*, says, "it shall include any creditor of the vendor or assignor at *any* time while such goods and chattels shall remain in his possession or under his control." The bill of exceptions and records show that Bristol was a creditor intermediate the sale, before the delivery, and while the goods were in possession and under the control of Ingersoll. These provisions are emphatic and unequivocal. They should not be frittered away by loose construction, or made to bend to any imaginary idea of expediency. Counsel for appellant seem to rely much upon an interpretation put upon the statute of California at an early day, by Mr. Chief Justice Murray, in a *very* brief opinion contained in 5 Cal. 227. Taking it that he was the great jurist he is claimed to be by appellants, and that he is *ac-*

*curate* in his quotation of the statute then in force in that state, and you will find a vast difference in its phraseology from the one under consideration. He says: "To constitute a valid sale of personal property against creditors, there must, according to the provisions of the statutes of this state, be 'an immediate delivery thereof, *accompanied* with an actual and continuous change of possession.'" It will be seen also, by reference to Wood's Digest of California Statutes, p. 107, secs. 403, 404, that its language has been changed so as that it is identical with sections 15 and 16 of our statutes. This may in a measure account for the different construction given it by the recent California decisions. The word "*accompanied*" is taken from that portion of the section referring to the change of possession, and placed in such connection that it qualifies the phrase "immediate delivery," which in turn refers to and qualifies sale. Under the statute thus transposed, the delivery must not only be immediate, but it must *accompany* the sale. All the argument of counsel that the articles to be delivered are bulky, or may be, or may be at a great distance from the place of the sale, is solved by the single suggestion that a delivery and acceptance is necessary, and that a bill of sale is not usually so bulky or unwieldy as that it would be cumbersome to *accompany* the sale and delivery." Some states have seen proper to make provisions for the exigencies suggested by counsel for appellants. Others have doubted its propriety, and consider that it subverts the very objects of the statute of frauds, and opens wide the gate for the consummation of that which it was obviously intended to prevent. Such has been the judgment of our legislative assembly, and the court below has but followed the law. "There are some questions the answers to which are so palpable and plain, that a lawyer often finds himself at an utter loss to find argument to maintain. Of such character is the one presented to the court." They are generally found where



the plain, palpable and unmistakable language of a statute, and unequivocal decisions of the courts under it, are sought to be invaded by the mere *ipse dicit* of counsel. "of such character is the one presented to the court" by the counsel of appellants, and their apology therefor is gratefully accepted.

The questions submitted involve a construction of sec. 15, p. 394, Laws of 1872.

We quite agree with counsel for appellants that we are not entirely without authority or precedent to guide us. Indeed, we have the concurrence of (Judge) Chief Justice Murray, "one of the ablest judges who ever occupied a seat on the bench of the supreme court of California," in an opinion opposed to the learned gentleman who prepared the brief of appellants in this case. *Chenery v. Palmer*, 6 Cal. 119.

This case goes further, and holds that such a transfer as this is void as to creditors, and this though delivery be made before levy is made by the creditor. To the same effect is the last adjudication by the same court on this question. *John A. Watson v. John Rogers*, 53 Cal. 401.

In this last case, Judge Rhodes, speaking for the entire court, says: "It (the code) denounces the transfer as fraudulent and void as against the claims of a creditor, who is such creditor during any of the time that the *person who makes the transfer remains in possession after a transfer*, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession. Such a transfer being void as to the creditor, he may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor."

The argument of appellants is ingenious, and might with more propriety be addressed to the legislature than the courts. However honest the transaction or intentions of the parties, the law, as it now exists, from motives of public policy, declares the contract void.

To remedy evil results which sometimes follow the enforcements of such a statute, and to meet such arguments and exigencies as are presented by appellants, it does not seem to us to depend so much "upon the length of the arm" to acquire possession, but rather whose arm it is.

"The strong arm of the law" appears to be more effective, however odious may be the comparison with the *length* of appellants. See Statutes of Missouri, sec. 10, ch. 67; R. C. 1845. It provides: "Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by *delivery in a reasonable time, regard being had to the situation of the property*, and be followed by an actual and continued change of possession of the thing sold, shall be presumed to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear to the jury, on the part of the person claiming under such sale, that the same was made in good faith and without any intent to defraud such creditor or purchaser."

Mark the distinction: Here provision is made for a delivery in "a reasonable time," and the presumption of fraud may be rebutted by proof of the *bona fides* of the transaction. Neither is permissible under the fifteenth section of our statute of frauds. See *Lesem v. Harniford*, 44 Mo. 323; *Woods v. Bugbey*, 29 Cal. 479.

In this latter case the court says: "If in fact there was not an actual and continued change of possession given, the statute pronounces the transfer fraudulent as to creditors, and the courts have no right to seek to evade its force and effect. No excuse or explanation can be entertained," etc.

Such a rule is the only one consistent with the object and purpose of the statute of frauds. It may be hard in a particular case, but it is founded in public policy and

cannot be made to yield to expediency or the circumstances of a given case. A principle once surrendered in a particular case is no longer firm, but trembles at every new attack. If a person in the town of Helena, who buys a stock of merchandise at Vestal, in another county, is allowed a reasonable time in which to take possession, in the absence of a statute *expressly* authorizing it, why would not a person who buys a stock of goods in Madison, Custer or Missoula counties be permitted a reasonable time in which to take possession from the remotest portion of the territory, if he happened to be there at the time of purchase; and we do not believe this would be contended. If an individual should purchase at Helena from a firm at Miles City, six hundred miles away, their stock of goods, and start without delay to take possession, and in the meantime a creditor of the vendor should levy on the property, would it be contended that the purchaser would have a "reasonable time" in which to take possession? We think not. Nor would it make any difference whether the creditor's levy was before or after such possession was taken by the vendee. *Chenery v. Palmer, supra; Watson v. Rogers, supra.*

If the time can be extended one hour to meet the exigencies of a particular case, it may be extended from that period indefinitely to meet the exigencies of another case, and thereby foster and encourage the very mischiefs the statute was designed to condemn. In resisting the first encroachment, the rule should be "*obsta principiis.*"

There is no dispute that the bill of sale was *intended* as an absolute sale, and to pass the title, but to have this effect under our statute the vendee ought to be where the property is when purchased. This position, we think, is strengthened by the statutory provision concerning chattel mortgages, which protects the mortgagee's rights while the property remains in the possession of the mortgagor, for a sufficient length of time in which to take *possession* or to record his mortgage, if the mortgage provide for retention of possession by the mortgagor.



The statute is in these words: "The mortgagee, in all mortgages made under this chapter, shall be allowed one day for every twenty-five miles of the distance between his residence and the county recorder's office where such mortgage ought by law to be recorded to conform with the provisions of this chapter, before any attachment or execution shall be valid made by the creditor of the mortgagor." Comley's Codified Statutes, sec. 906, p. 808.

In other words, this section *expressly* gives to the mortgagee a reasonable time in which to take possession or comply with the other requirements, and defines, in effect, what a reasonable time is. Appellants ask the court to interpolate a similar provision into the section under consideration, when the legislature manifestly intended what it says, that such sale shall be "*accompanied*" by an immediate delivery, and *followed* by a continued change of possession. We do not quite agree with the learned counsel for appellants that the construction given to this statute by the court below "will tend to the destruction of business." If so, as before suggested, the innovation upon the statute ought not to be made by the court, but the argument should be addressed to the legislature.

"Stop innovation in its early stage,  
For when the upstart thing grows strong from age,  
No time, nor strength of tenets, stop its rage."

SANDERS & CULLEN, for appellants on rehearing.

In this case, the court below decided that the execution and delivery of a bill of sale of a stock of goods at a distance of twenty-three miles from where the goods were situate, at ten o'clock P. M., and the taking or delivery of possession of the goods at four o'clock the next morning, was within the condemnation of sec. 15, p. 394, of the statutes of 1871-2, and that the intervention of six hours between the delivery of the bill of sale and the goods was "conclusive evidence of fraud" as against a then creditor, who, two or three days thereafter, should attach said goods in the possession of such vendee.

Without equivocation or shrinking the court below made that decision, and the court then made an order that its said decision, with the exception thereto, should be "made a part of the record," which was done, and that record is in this court for review upon an appeal.

The respondent's counsel are not anxious to have that decision reviewed, and have in effect asserted the proposition that the authority of the court to make its decisions and transactions a part of the record, by order, is not authorized expressly by the statute nor deducible from its inherent powers. We challenge both propositions:

1st. Express authority of statute: "Bills of exceptions and appeals *shall be allowed in all cases* from the *final decisions* of said district courts to the supreme court." [A short extract from the law creating this court.] An exception is an objection taken to a decision upon a matter of law . . . from the calling of the action to the rendition of the verdict or decision. . . . The final decision in an action is "deemed to have been excepted to." No particular form of exception shall be required. The objection shall be stated with so much of the evidence . . . as is necessary to explain it. [Wisdom of Solomon, otherwise called Montana Code, secs. 279, 280, 282.]

"The following papers shall constitute the judgment roll. . . . Second. . . . *All bills of exceptions taken and filed in said action.*" [Sec. 294, the same Wisdom.]

"All bills of exception shall be reduced to form . . . and signed during the *term* [clerical error makes it "time"] in which the same is tried," etc., etc. Sec. 816.

If congress enacts that bills of exceptions and appeals shall be allowed from *final* decisions, it will be difficult to maintain that it is within the competency of a Montana legislative assembly to deny a bill of exceptions and appeal from the final decision, and confine it to the interlocutory rulings, without maintaining revisory power of the legislature over the acts of cong

2d. Power inherent in courts independent of statutes: The authority of a court over its proceedings, its power to make any of its proceedings under the hand and seal of the judge part of the record, cannot be impugned, and until now has been unquestioned. Indeed, bills of exceptions have been disregarded where it has not been expressly ordered that they be "made a part of the record." *Wheeler v. Winn*, 53 Pa. St. 122; *Conrow v. Schloss*, 55 Pa. 28; *Endicott v. Pet*, 24 Pick. 339.

The claim that a motion must have been made for a new trial in the court below is conclusively disposed of by saying that there was no irregularity, abuse of discretion, misconduct, accident, surprise, or newly discovered evidence, which are the sole grounds for new trials. No new trial could have been granted, and the law does not require a vain thing.

There was no conflicting evidence. Plaintiffs proved purchase by and delivery to them of goods by Ingersoll, and subsequent taking by sheriff for Bristol; but defendants stand over the proceedings with a stop-watch, and say sale and delivery were not instantaneously contemporaneous, and are therefore fraudulent. If it were necessary to uphold a sale, the court would say that while bill of sale was handed to party at ten P. M., yet it was not actually delivered until four A. M., when goods were delivered. But words, phrases, statutes, are to be reasonably interpreted in the light of the evil they were designed to remedy. *Cravens v. Dewey*, 13 Cal. 40.

If this bill of exceptions were faulty, it could only be taken advantage of by motion to strike out; and a motion to strike out the complaint would be as proper as to strike out any other part of the bill. Nor has there been any motion to dismiss the appeal; but where the case is up for trial on its merits, these questions are argued as if they pertained to the merits of the case. This judgment roll discloses material error.

If this had been a suit on a promissory note or bill of exchange, and, on having been put in evidence, the de-



fendants had filed a motion for non-suit, because it did not express a consideration or was not under seal, and it had been sustained, the case would have been parallel to this, and it could have been as successfully maintained that a motion for a new trial was necessary, and that it was a case of non-suit for the reason that the evidence did not sustain the judgment.

A bill of exceptions is founded on some objection in point of law to the opinion and direction of the court as to admissibility of evidence, *the legal effect of it*, or some matter of law arising *on facts not denied*. *Wheeler v. Winn*, 52 Pa. St. 126.

What judgment should be rendered on an agreed or a given statement of facts, whether evidence enough is given to entitle a case to go to a jury, is always a question of law. The appeal to be made in sixty days is where the question is one of preponderance of proof. Errors of *law* could always be saved by bills of exceptions. This error should be re-examined and corrected.

The court has desired a rehearing, as we understand it, upon a single proposition. Is it proper for the court to grant a non-suit under the provisions of the statute of frauds of this territory? There was no statement on appeal and no motion made for a new trial. All that can be considered here is the judgment roll. This court, and other courts under a similar statute, have so often decided this question that it can certainly be no longer an open one. The bill of exceptions was not signed until after the judgment of non-suit; it could not have been, in the very nature of things. Consequently, under the statute, it forms no part of the judgment roll, and cannot be considered on this appeal whether in criminal or civil cases. This court has uniformly held that the appellant, in order to have alleged errors reversed, must preserve and present them in the mode prescribed by the statute or they cannot be entertained.

The evidence, or its sufficiency or insufficiency to sup-

port the judgment of non-suit, we take it, is not a proposition to be considered, nor is it comprised in the question upon which the rehearing is to be had. The complaint, answer, replication and judgment, being all that is before the court, show that a non-suit was had. It will be presumed, therefore, to have been properly granted, if the court had the power under the statute to grant it. We have referred to this for the reason that counsel for appellant have cited us to a case which bears alone upon the question of the sufficiency of the evidence to support the judgment of the court.

First. Did the court have power, under sec. 174 of Codified Statutes of 1879, then in force, upon a total failure of proof of an immediate delivery accompanying the sale, as provided by sections 169 and 170, to grant a non-suit?

(a) Sec. 241 provides for the submission of all questions of facts to a jury, unless a jury is waived; and sec. 234 (preceding the submission of the case to the jury), subdivision 5, confers upon the court power to grant a non-suit, upon motion of defendant, when plaintiff fails to prove a sufficient case for the jury. The mode of reviewing the question of the sufficiency of the proof is familiar to court and counsel. Under these sections of the statute it never has been doubted but that the court has power to, and that it was its duty, if it would set aside a verdict upon the insufficiency of the evidence, when such a motion was properly presented, to grant a non-suit when requested by defendant. The constitutional right of trial by jury at common law has never been construed to abridge the right of the court, upon a failure of proof, or upon uncontradicted testimony, to grant a non-suit. Certainly sec. 174 is not stronger in its terms, nor does it comprise more than sections 237 to 241, inclusive; both in like terms define *what is a question of fact, and to whom it shall be submitted*. See 24 Comstock, 468; *Territory v. McAndrews*, 3 Montana, 160 *et seq.*

(b) There is no trouble in the case when the proper distinction is made between *actual* or *positive* fraud, and *constructive* or *legal* fraud. In the former class of cases intent alone constitutes the fraud. They are cases *quasi* criminal in their character, and are especially referred to a jury to pass upon that question. In the latter class of cases a transaction under a given state of facts is declared *per se* to be a fraud as to creditors, regardless of what the intent of the parties may have been. See Statutes of 1879, pp. 578, 579, secs. 169, 176. Now, by sec. 174, last cited, it will be seen that it is only cases where *fraudulent intent* is involved that it is deemed a question of fact and not of law. Under the maxim, "*Expressio unius, exclusio alterius*," it is tantamount to saying that in other cases, the facts being undisputed, it is a question of law, and under subd. 5, sec. 234, a non-suit is proper; and this is just what all the authorities upon the subject say, so far as we have been able to discover. *Ringold v. Haven*, 1 Cal. 108, 121, 125; *Fitzgerald v. Brown*, 4 Cal. 289; *Cheenev v. Palmer*, 6 Cal. 119 (5th ed.), 503; *Ensminger v. McIntire*, 23 Cal. 593; *Davis v. Woods*, 29 Cal. 466; *Levy v. Getleson*, 27 Cal. 685; *Clafin v. Rosenburg*, 42 Mo. 439; 44 id. 323; *Bishop v. O'Connell*, 55 Mo. 158; *Donohue v. Gallavan*, 43 Cal. 576; *Miller, Brown & Co. v. Henry*, 40 Pa. 352; *Luck v. Skants*, 2 Phill. (Pa.) 310; Charge to Jury, Thompson, sec. 21, p. 24; 13 U. S. Digest (N. S.), p. 343, sec. 3157, and authorities there cited; *Watson v. Rogers*, 53 Cal. 401.

For authorities at common law referred to in 27 and 29 California, and 42, 44 and 56 Mo., *supra*, see *Edwards v. Harlem*, 2 T. & R. Rep. 587; *Hamilton v. Russell*, 1 Curtis, 415; *S. C. 1 Cranch* (U. S.), 310; *Griswold v. Sheldon*, 4 Comstock (N. Y.), 581 *et seq.* and authorities there cited.

GALBRAITH, J. This is an appeal from a judgment directed to be entered by the court in pursuance of its



action in granting a motion for a non-suit. The transcript, in addition to papers constituting the judgment roll in the case, contains an "agreement" between the parties in relation to what questions should be tried; a "stipulation" in relation to an amendment of the *ad damnum* clause of the complaint, the disposition of the property, and other matters between the attorneys in the case; and also contains evidence introduced upon the trial (which was to a jury) by the plaintiff. Neither the "agreement," the "stipulation," nor the evidence, are expressly made part of, nor expressly stated in any bill of exceptions, but are simply certified to by the clerk as being a "full, true and correct transcript of certain records and proceedings filed, made and had in said court, in the above entitled cause, as the same are of record and filed in my office." Therefore, the above "agreement," "stipulation" and evidence do not constitute any part of the judgment roll, not having been made a part of or stated with a bill of exceptions, excepting that part of the "stipulation" which relates to the amendment of the complaint. This may be considered a part of the judgment roll, as constituting a portion of the pleadings. It is contended on the part of appellants that the power to make any of its proceedings under the hand and seal of the judge a part of the record is inherent in courts, independent of statute. Be this as it may, nevertheless, when the law-making power has denominated what shall constitute the judgment roll, the court will not assume to add to or detract from its specifications in relation thereto.

An *exception* is designated by the statute as being "an objection taken on the trial to a decision upon a matter of law at any time from the calling of the action for trial to the rendering of the verdict or decision." Sec. 279 of the Code of Civil Procedure. Section 294 of the same act also provides what papers shall constitute the judgment roll, and specifies among them, "all bills of exception taken and filed in said action."

The exception taken by the appellant to the ruling of the court sustaining the motion for a non-suit, and directing judgment to be entered in favor of the defendant, could not, in the very nature of the case, be an exception within the meaning of the above provisions, and therefore is no part of the judgment roll. It could not have been taken until after the rendition of the decision of the court. But granting, for the sake of the argument, that the above bill of exceptions did constitute a part of the judgment roll, nevertheless the evidence and other matters contained in the "agreement" and "stipulation," so far as they relate to the motion for a non-suit, cannot be considered in connection with such a bill of exceptions. The bill of exceptions is as follows, viz.: "To the entry of which said judgment the plaintiff then and there excepted, and asked the court to sign this bill of exceptions, and that the same be made part of the record, which is done accordingly this 22d day of March, 1880. (Signed) D. S. WADE, Judge."

Section 282 of the Code of Civil Procedure requires that "the objections shall be stated with so much of the evidence or other matter as is necessary to explain it." Section 281 requires that "the point of the exception shall be particularly stated, . . . and may be delivered in writing to the judge; . . . when delivered in writing, . . . it shall be made conformable to the truth, or be at the time corrected until it be made so conformable."

From these sections we must conclude that the particular facts, whether evidence or other matter, upon which the court rules, are intended to be presented in the bill of exceptions. It is apparent that it is principally for this reason that it is made the duty of the court to settle the exception, or, in the language of the statute, to correct it when delivered in writing, until "it shall be made conformable to the truth." That the Code of Civil Procedure intends that the bill of exceptions shall contain the evidence or other matter upon which the alleged objec-

tionable ruling of the court is made, is also evident from the fact that the only kind of papers specified, among those constituting the judgment roll, which could possibly contain the evidence, are bills of exception. The Code of Civil Procedure contemplates an appeal from the judgment, in which the judgment roll alone may be considered. This is when there is no statement annexed to the judgment roll. The provisions of the California Practice Act, in respect to the method of presenting the action of the court below for review, are almost identical with those of our Code of Civil Procedure. In reference to this subject, in *Wetherbee v. Carroll*, 33 Cal. 549, Sawyer, J., giving the opinion, says: "The judgment roll is itself a record for an appeal, and there may be no occasion for anything further to present the question raised. But it has been settled from an early day, that, by an appeal from a judgment without statement, nothing is brought up or is a part of the record on appeal except the judgment roll, and no question arising outside of the roll can be considered. If any further record is required, it must be in the form of a statement." Also in reference to exceptions, in the same case, the same judge says: "They are the only exceptions or bills of exceptions known to our Practice Act, except so far as a ruling and exception to it, presented by a statement made in the mode prescribed by that act, may be regarded as a bill of exceptions. *Quivey v. Gambert*, 32 Cal. 304. The reasons upon which this restriction of the cases for exceptions, and for the mode prescribed for taking them, seem obvious enough. At the trial both parties are present, and in settling the exceptions can be heard. Each party can see that everything necessary to the presentation of the entire merits on both sides is introduced. 'The objection shall be stated with so much of the evidence, or other matter, as is necessary to explain it, but no more.' See p 92; Mont. Code of Civil Procedure, sec. 282. The parties have the same opportunity for se-



curing a correct presentation of the exceptions as is offered in settling a statement. The only other mode of making up anything like, or answering to, a bill of exceptions is by a statement proposed in the manner prescribed by the Practice Act, in the preparation of which both sides are also heard. The policy of the act is that, whenever there is a possibility that a partial record for presenting a point may be made, both parties shall have an opportunity to take part in settling it. And the two modes prescribed, one by settling the exception during the progress of the trial in the presence of both parties, and annexing it to the judgment roll; the other by a subsequent statement in the mode designated, afford an orderly and convenient mode of accomplishing that end."

The above language is quoted as being expressive of our own view in relation to our practice on appeal. It will be observed that the above bill of exceptions does not contain, nor is it stated with, any evidence or other matter contained in the transcript. It does not refer in any manner to any such evidence or matter. It does not appear from the bill of exceptions, or even from the transcript, that the evidence which the transcript contains was all the evidence upon which the court ruled, or that it was settled by the judge, or that both parties had the same opportunity for securing a correct presentation or took part in the settlement thereof. We must therefore conclude that the evidence set forth in the transcript is not any part of the bill of exceptions, and therefore no part of the judgment roll. The transcript does not show any compliance with, or attempt to comply with, section 419 of the Code of Civil Procedure, in relation to statements on appeal. There is, therefore, no such statement. If, therefore, the appellants rely upon their bill of exception, the evidence cannot be considered in connection therewith, for it is not any part of the judgment roll. If they rely upon the other position taken in their brief, that the final decision in the case is deemed

to have been excepted to, and that the granting of the non-suit was such a decision, then for the reasons that the evidence is no part of the judgment roll, and that there is no statement on appeal, the evidence cannot be considered. The bill of exceptions is also defective, in that it does not particularly state the point of the exception, as required by section 281 of the Code of Civil Procedure. We can see no error in the judgment roll. When nothing appears to the contrary, the decision of the court will be presumed to be correct. Therefore, when the court grants a non-suit, and the evidence introduced does not appear or cannot be considered, it will be presumed that the plaintiff failed to prove a sufficient case for a jury. The above reasons are sufficient for the dismissal of the appeal. But in order to aid in the settlement of the practice, some other questions presented by the arguments of counsel will be briefly considered. It is argued by appellants that under the organic act they are entitled to have the cause reviewed upon the showing made by the transcript, notwithstanding the provisions of the Code of Civil Procedure in relation to appeals. According to appellants' brief, the provision of the organic act which is relied upon to support this position is as follows: "Bills of exception and appeals shall be allowed in all cases from the final decision of said district courts to the supreme court."

It will be seen by reference to section 9 of said act, containing the above language, that the sentence in which the same appears concludes with the additional language, "under such regulations as may be prescribed by law."

The same instrument also provides for a legislative assembly. The words, "such regulations as may be prescribed by law," refer to regulations to be made by the legislative assembly of the territory. Under this provision the legislative assembly may fix the time and prescribe the methods by which appeals may be taken, so long as such regulations do not amount to a denial of the

right conferred by the organic act. The provisions of the legislative assembly in relation to appeals are reasonable and sufficient for the purpose. The organic act is not, therefore, infringed by requiring the appellants to comply with the provisions of the Code of Civil Procedure, in relation to the method therein prescribed, regulating appeals.

It is also contended, by respondents, that a motion for a new trial was necessary, and that therefore the evidence should have been presented in a statement on such a motion. Section 284 of the Code of Civil Procedure defines a new trial as "a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court or referee." It contemplates, therefore, a case in which evidence has been submitted to, and has been passed upon by, the proper tribunal provided by law to try an issue of fact. By section 241 of the Code of Civil Procedure, "the trial of an issue of fact must be by a jury, except in actions which involve the settlement of accounts, unless waived by the parties." "A judgment of non-suit may be entered," under the fifth subdivision of sec. 234 of the said act, "by the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for a jury." The jury, therefore, which under the law is the tribunal chosen to try the cause, is prevented therefrom by the action of the court, not acting as having authority to try the issue, but by reason of its general powers as a court to try matters of law, as well as by the express provision of said subdivision of sec. 234. There never was, therefore, a trial of the issue by the proper tribunal, and therefore a motion for a new trial is not, in such a case, contemplated by the code. There never was a trial by a jury because, in the judgment of the court, "the plaintiff failed to prove a case for the jury." There was not a trial by the court because a jury was not waived, but was the tribunal chosen to try the issue. It was, therefore, by its



power as judge of the law applied to the evidence introduced by plaintiffs that the court granted the motion of non-suit and took the case from the jury. This may perhaps be better illustrated by reference to the practice which obtained in England in the same class of cases. Under that practice, what is now provided for by said subdivision of sec. 234, in relation to non-suit, was taken advantage of by what was called a demurrer to evidence. This took place when a party disputed the legal effect of the evidence offered. It was analogous to a demurrer in pleading. It was a virtual declaration by the party from whom it came, that he would not proceed, because the evidence offered on the other side was not sufficient to maintain the issue. Stephens on Pleading, p. 90.

The motion for a non-suit under the subdivision of section 234, and the demurrer to evidence, if not precisely similar, bear a close analogy. "A demurrer to evidence is analogous to a demurrer in pleading." Same reference. We are therefore to conclude that the action of the court in granting a non-suit, upon the ground that the plaintiff has failed to prove a sufficient case for a jury, is as much a decision upon a matter of law as its action in sustaining a demurrer to a pleading. Such a decision, therefore, does not come within the meaning of trial as defined by the code, and such a motion, therefore, could not be properly made as part of the proceeding necessary to present this case for review upon the evidence already in the case. It is desirable that a uniform practice should be enforced. The statute has provided such a method, adapted to the different kinds of judicial proceedings. The only practical mode of securing uniformity in the practice is by requiring a strict adherence to these methods. For the purpose of aiding in the furtherance of this object, we will now say that, in our opinion, the method to be pursued in bringing up the evidence, in such cases as the one at bar, for revision, is by statement upon appeal. A statement on motion for

a new trial is improper, as such a motion, after granting a non-suit for the reason that the plaintiff has failed to prove a sufficient case for a jury, is not contemplated by the statute. The objection to the action of the court in granting such non-suit cannot be made until after the rendition of the decision. And such an objection is not an exception as that term is defined by the statute. The evidence can only be made a part of the judgment roll by having it settled in a bill of exceptions. In a case where such motion for non-suit is refused, we are of the opinion that the evidence can be brought up either in a bill of exceptions or in a statement upon appeal. The ruling in such a case is made both during the trial and before the rendition of the verdict or decision. By the word decision in its connection in section 279, we understand the legislature to indicate the final decision of the court.

The judgment is affirmed, with costs.

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JAMES K. PARDEE, respondent, v. HUGH T. MURRAY ET AL., appellants.

*APPEAL — Time of filing undertaking.*—An appeal to the supreme court is ineffectual unless an undertaking is filed within the time limited by statute.

If the undertaking was filed within the statutory time, and the error is in the record, the correction must be made in the court below. The motion to dismiss will not be granted, but a motion suggesting a diminution of the record will be sustained and the cause remitted for correction.

*Appeal from Second District, Deer Lodge County.*

SANDERS & CULLEN, HIRAM KNOWLES and THOS. L. NAPTON, for respondents.

E. W. & J. K. TOOLE and J. C. ROBINSON, for appellants.

The statute of Montana territory provides that, to make an appeal effectual for any purpose, the appellant shall, within five days after the service of the notice of appeal, file an undertaking. See Code of Civil Procedure of Montana for the year A. D. 1877, p. 150, sec. 409.

The notice of appeal was mailed, as it appears by the record, on the 5th day of June, 1880, and directed to W. F. Sanders, Helena, Montana territory. As will appear by the affidavit of Hiram Knowles, filed with this motion, the distance between Deer Lodge, Deer Lodge county, Montana territory, and Helena, Lewis & Clark county, Montana territory, is not to exceed forty-six miles. The service of said notice, then, was, on the 7th day of June, complete.

The undertaking was not filed until the 10th day of July, 1880. This was, as the court will see, more than thirty days from the date of the service of said notice.

An appeal must be taken as is provided by law. The manner of taking an appeal is a creature of statute. *Appeal of S. O. Houghton*, 42 Cal. 35.

This court has no jurisdiction of an appeal unless the undertaking is filed within five days from the service of the notice of appeal. *Hastings v. Halleck et al.* 10 Cal. 31; *Aram v. Shallenberger*, 42 Cal. 275.

WADE, C. J. The respondent moves to dismiss this appeal for the reason that the undertaking was not filed within the time prescribed by the statute.

The notice of appeal was served on the 5th day of June, 1880, and the undertaking was filed on the 10th day of July, 1880.

The code, section 409, provides that an appeal is taken by filing with the clerk of the court in which the judgment is rendered, or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The section fur-



ther provides that the appeal is ineffectual for any purpose, unless, within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made, or that the undertaking be waived in writing.

This section of our code is the same as that of the California code, and the supreme court of that state has construed the section, passing directly upon the effect and consequence of failing to file the undertaking within the statutory time, and holding that such failure is fatal to the appeal.

In *Hastings v. Halleck*, 10 Cal. 31, the court says: "To constitute an appeal there are three things necessary: first, filing the notice; second, the service of the same; and third, filing the undertaking. All these steps must be taken within the times limited by the statute. If not so taken there is no appeal perfected, and the court has no jurisdiction of the case." Referring to *Bryan v. Berry*, 8 Cal. 133; *Franklin v. Reiner*, id. 341; *Whipley v. Mills*, 9 Cal. 641.

In the case of *Aram v. Shallenberger*, 42 Cal. 278, the court says: "The times at which, and the successive order in which, the several steps are to be pursued to take and perfect an appeal, are distinctly prescribed by statute, and must be observed; otherwise the appeal must fail here, if timely objection be taken by the respondent. We have no authority to relieve a party from the consequences of a failure in these respects."

These authorities seem conclusive upon the question that there was no appeal perfected in the case, because of the failure to file the undertaking within the time limited by law.

But the appellants say by affidavit there is an error in the record, and that the notice was served and the undertaking filed within the statutory time. If this is true, the error may be corrected in the court below. It cannot be corrected here. We cannot make records for that

court. The appellants ought to have an opportunity to correct any error in the record in the proper court. This motion, suggesting a diminution of the record, and that the same be remitted to the court below for correction, is granted.

*Motion to dismiss overruled.*

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THE U. S. EX REL. YOUNG, petitioner in habeas corpus,  
v. IMODA.

**HABEAS CORPUS** — *Power of agents over Indian children.*— A writ of *habeas corpus* will not lie in favor of an Indian agent to recover the custody of Indian children taken from an agency school by a Catholic priest, it not appearing to have been done against the consent of the parents of such children. Neither by treaty or statute have the Indians surrendered to the United States the right to compel their children to attend school, nor has the United States assumed to possess or exercise such right. If the Indians fail in their treaty engagements in this respect, neither treaty or statute provide a penalty, nor does the right of compulsion pass to the United States or its agents. It must be exercised by the parents of such children or the tribe to which they belong.

THIS is an application made to the supreme court of the territory of Montana, by John Young, agent of the Black-foot Indians, against the defendant, C. Imoda, a Roman Catholic priest, to compel the return of two Indian children, alleged to have been taken away from the agency school against the wishes and without the consent of the agent.

JAMES L. DRYDEN, United States District Attorney, for petitioner.

The petitioner invokes the aid of this court in the release and return to the reservation, and the educational privileges provided by petitioner, of the two Indian children, Ah-Ween and So-Ween-a-Muck.

I. Petitioner's right to relief sought.

(a) Articles of Confederation, art. 9.

(b) Constitution U. S. sec. 8, art. 7, clause 3.

(c) Under above grants United States assumed control of Indian affairs, by ordinance of August, 1786, regulation of affairs turned over to war department, continued there by act of August, 1789, where it continued until present arrangement of act of 1869.

(d) Means and appropriations for the education of the Indians, made in 1819 (3 Stat. at Large, 516), and same provision continued under various acts and treaties, on down to the present. Sec. 2071, Rev. Stat. 1878.

(e) Under treaty of April, 1868, art. 7 (Revision of Treaties, page 918), means of education guarantied children of Blackfeet, their attendance upon school stipulated for, and the agent specially authorized to enforce these stipulations.

(f) What is the limit of the control of government over Indian affairs? Practically unlimited, under statutes and treaties. Government locates and removes them at pleasure; forbids hunting, fishing, trading, etc.; forbids all surveys, settlement or encroachment upon reservations; forbids introduction and sale of spirituous liquors; regulates their sanitary and sumptuary condition; protects, maintains and provides for them, and in short exercises all the functions of guardian.

(g) Upon what principles, or by what authority, is this right of control established?

1st. The peculiar relationship between the two justifies the one in assuming control over the other. The tribes are neither independent states nor foreign nations, but were unsettled domestic dependencies. *Cherokee Nation v. State of Georgia*, 9 Curtis, 178-235; *Worcester v. State of Georgia*, 10 Curtis, 214-274. The states and all individuals are prohibited from interfering with control of government over them. *Cherokee Nation and Worcester v. Georgia*, *supra*.

Their title to soil only that of occupation and posses-



sion, and interference by state, foreign power or individual looked upon as invasion of rights of government.

2d. Authority derived from consent of tribes themselves. All treaties, stipulations, grants, executions, orders and acts of congress, to and with the tribes, are based upon their consent, express or implied. Applied particularly to treaty of 1868, now in force, and quoted in petition.

(h) Applied to case at bar.

1st. From the express terms by which government is empowered by the charters to manage *all the affairs of the tribes*.

2d. From the long continued and undisputed exercise of the right.

3d. From the acquiescence of state and territorial governments.

4th. From the peculiar relations of the parties.

5th. From the consent of the Indians themselves.

6th. From the terms of existing contracts, guaranteeing protection and support on part of the government, and obedience and efforts toward development on the part of the tribes. We contend:

(1) That the government of the United States is, and of right ought to be, charged with the sole and exclusive management and direction of the educational, as well as other, interests of the Indians.

(2) That the peculiar relationship and dependence of the one upon the other not only justify, but constitute the government the proper and natural guardian of the tribes, and that only when they lose their distinctive peculiarities by merging, either as tribes or as individuals, into citizenship, do these people become emancipated from this exclusive control and guardianship of the general government.

(i) Force and effect of treaties.

Under the authority of the charters of government, congress has right to declare the general government the

legal guardian of the Indian tribes. Precisely the same thing, in effect, is done by treaty of 1868; and as to the force and effect of treaties see opinion of court. *U. S. v. Schooner Peggy*, 1 Cranch, 37; *Foster & Elons v. Neilson*, 2 Pet. 253; Att'y Gen'l Cushing, Opinions of Att'y Gen'l, 6, p. 291; Opinions of Att'y Gen'l, 13, pp. 354, 359; id. vol. 15, p. 632; *Worcester v. Georgia*, *supra*.

## II. Of *habeas corpus*.

(a) Is also of charter origin. Art. I, sec. 9, clause 2, Constitution of United States; Ordinance of July 13, 1787, art. II, Government of Northwest Territory; Codified Laws Montana (1871 and 2), p. 487.

(b) A writ of right. Kent. Com. vol. 1, p. 640.

(c) A common law right. *Sims' Case*, 7 Cush. 285; *Passmore Williamson*, 26 Penn. 1.

(d) Also express constitutional right at all times except invasion, etc. Constitution and Ordinance 1787, *supra*.

(e) Not limited to "criminal or supposed criminal matters," but writ of right, which subject is entitled to *ex debito justitiæ*. Bac. Abr. Habeas Corpus, "A;" Kent. Com. vol. 1, p. 642; *Cable v. Cooper*, 15 Johns. (N. Y.) 154; *Case of J. and N. Yates*, 4 Johns. (N. Y.) 322.

(f) Person restrained entitled to apply for himself. 14 Howard State Trials, 814; Hurd on Habeas Corpus, p. 211.

(g) No legal relation between party restrained and party making application required. May be made by any one. *State v. Philpot*, Dudley, Geo. Rep. 42.

(h) Mere volunteers will not be listened to. What the court will consider. Hurd on Habeas Corpus, p. 213.

(i) What is restraint(?). Kent. Com. vol. 1, p. 631; *Homer v. Battyn*, Buller, Nisi Prius, 62; *Pike v. Hanson*, 9 N. H. 401; *Com. v. Ridgway*, 2 Ashmead (Pa.), 247; Hurd on Habeas Corpus, p. 210.

## III. Jurisdiction.

(a) Act May 26, 1864, providing temporary government for Montana territory, chap. 95, sec. 9 (13 Stat. 88, 89), provides for appeal to supreme court of United States

from decisions of supreme court and district courts of territory on questions of *habeas corpus*, by implication. Court has jurisdiction.

(b) This is a court of the United States. Jurisdiction in this class of cases is not exclusive in circuit or district courts. If court has jurisdiction of subject matter and parties, then it has jurisdiction of case, not only as a court of United States, but by common law jurisdiction, under section 1868, Rev. Stat. 1878. See Codified Laws Mont. 1871-2, p. 487, §§ 1, 2, 3, 4.

WADE, C. J. This is an application for a writ of *habeas corpus*. The petition in substance states that the petitioner is the agent of the United States for the tribe of Indians known as the Blackfeet Indians, dwelling within the territory of Montana; that under and by virtue of certain treaties between the United States and said tribes, and the acts of congress pertaining thereto, the United States has established a school at the Blackfoot agency for the education of the minor children of said tribe of Indians, and that such agent, by virtue of said laws and treaties, is given the right, on behalf of the United States, to the custody, care, training and education of said minor children.

The petition further states that one C. Imoda, a priest of the Roman Catholic church of the St. Peter's mission, on the 23d day of May, 1880, came upon the Blackfoot reservation, and did unlawfully seduce, entice and abduct from the said school and from the reservation, and did carry and lead away with him beyond the limits of the reservation, and without their consent or that of the United States, two Indian boys, to wit, Ah-Ween, aged twelve years, and So-Ween-a-Much, aged nine years, whose parents are members of the said Blackfoot tribe, and refuses on demand to surrender said children to said agent of the United States. Wherefore the petition for a writ of *habeas corpus*.

The relations existing between the United States and



the Indian tribes are regulated by treaty stipulation. It is not necessary to inquire by what right or authority these tribes and the United States treat and contract with each other. It was argued at the bar that the relation existing between the Indians and the United States was substantially that of guardian and ward, and hence that the United States, as guardian, had the right to the custody and care of its wards, the children aforesaid. What difficulties might arise in attempting to explain how the general government, as guardian, has the right to treat and contract with its wards, we shall not undertake to point out. It is sufficient to know that the government does treat with the Indians. For the purposes of this case, we must consider the Indian tribes as distinct communities, capable of entering into and forming treaties with the United States.

It has ever been the policy of the government, while asserting final sovereignty and dominion over the soil within its jurisdiction, to respect the possessory or other rights of the various Indian tribes. Such rights have been enlarged or extinguished by treaty. The government recognizes the authority of the Indian tribes to make treaties. It does not assert any authority over the Indians except such as is founded upon their consent. The government has attempted to civilize the Indians and to give to their children the rudiments of an education, but whatever has been done in this regard has been performed by virtue of treaty stipulation.

The rights of the petitioner, then, must depend upon the provisions of the treaty existing between the United States and the Blackfoot tribe, and the laws of congress made in aid of and not in conflict therewith.

Article 7 of the treaty is as follows: "In order to insure the civilization of the Indians entering into the treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves

to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent of said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher." Revision of Indian Treaties, p. 918.

As early as 1819, and long prior to the taking effect of the treaty aforesaid, congress, with a view to the education and civilization of the Indians, had enacted the following statute, which is still in force: "The president may in every case, where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties. A report of the proceedings adopted in the execution of this provision shall be annually laid before congress." Revised Statutes of the U. S., sec. 2071, p. 865.

Upon this statute and treaty the relator rests his right to the writ prayed for in his petition. And the question presented is, whether the Blackfeet Indians, by having entered into this treaty obligation, thereby surrendered to the United States or to its agents the right to the possession, custody, care and education of their minor children.

This treaty and statute fairly illustrates the policy of

the government towards the Indians. The purpose is to civilize and educate them. But the government does not assume to force upon the Indians an education, nor to compel them to adopt the modes of civilized life. The fundamental idea is that whatever is done in the premises must be by consent of the Indians. The treaty is based entirely upon that proposition. It admits the necessity of an education for the purpose of civilizing the Indians. It provides for a school house and a competent teacher at the agency. And the Indians on their part contract and promise to compel their children, male and female, between the ages of six and sixteen, to attend school, and it is made the duty of the agent to see that this stipulation is carried out.

By the terms of the treaty the Indians are to compel their children to attend school. But the United States is given no authority over the children; certainly is not given the right to their custody and possession. The agent of the United States is only charged with the duty of seeing to it that the Indians redeem their pledge and send their children to school. But suppose they do not? Suppose they violate their pledge and fail to perform their contract? Is such failure accompanied by a penalty giving to the United States the right to the possession and custody of the children of the tribe? We think not. The United States cannot compel these Indian children to attend the school. Such attendance can only be enforced by their parents or the Indians of the tribe.

If this were an application by the parents to recover the custody and possession of their children, a very different case would be presented. It does not appear that these children were taken by the priest against the consent of their parents; and if with their consent, and they have thus failed to perform the pledge and contract of the treaty, we do not think that the United States, thereby, becomes entitled to the custody of their children.

The application for the writ of *habeas corpus* is therefore denied.

*Application denied.*



McMAHON, appellant, v. THORNTON ET AL., respondents.

PLEADING — *Misjoinder of parties — Agency or partnership — Ambiguity and multifariousness.* — A complaint that sufficiently charges a partnership and asks for an accounting is not demurrable for ambiguity, though it sets forth in addition special cause of action against one of the partners. The latter may be stricken out on motion as surplusage, or *quære*, may be good as re-enforcing the allegation of partnership. The action cannot proceed against one partner alone as agent until after an accounting, to which all partners are necessary parties, and there is no misjoinder in including all partners as defendants.

Such complaint is not obnoxious to the charge of multifariousness unless it sets forth two distinct causes of action such as could not be united under the code.

*Appeal from Second District, Deer Lodge County.*

S. DE WOLF, for appellant.

1. The complaint states a cause of action, in ordinary and concise language, and is sufficient both under the code, and as containing every essential averment of a bill in equity, to entitle the plaintiff to an accounting. Code of Civil Prac. secs. 81, 83, 98, 117.

2. The right to an accounting on the dissolution of a copartnership follows as a matter of course. Story's Equity, secs. 671, 672; Story, Part. 347, note 1, 348, 349; Pars. Part. 508-512; *Ross v. Cornell*, 45 Cal. 133; *Nesbit v. Nash*, 52 Cal. 540; *Cottle v. Leitch*, 35 Cal. 434; *Prim v. Ormsbee*, 2 Abb. Pr. (U. S.) 375; *Mitchell v. O'Neil*, 4 Nev. 504; *Young v. Pearson*, 1 Cal. 448.

3. In an action for an accounting between former partners, all the partners should be made parties. *Young v. Hoglan*, 52 Cal. 466; *Wiggins v. Cummings*, 8 Allen, 353; *September v. Putnam*, 30 Cal. 490; *Ross v. Cornell*, 45 Cal. 133; *Blood v. Fairbanks*, 48 Cal. 171.

4. Mining copartnerships, in all matters relating to a dissolution and the liability of the copartners to account to one another, are governed by the same rules as commercial or other partnerships. *Skillman v. Lachman*, 23

Cal. 199; *Duryea v. Burt*, 28 Cal. 569; *Jones v. Clark*, 42 Cal. 180.

5. The smelter mentioned in the complaint is treated in equity as personal property for the purpose of adjusting partnership accounts. Story, Part. sec. 92; Pars. Part. 364; *Dupey v. Leavenworth*, 17 Cal. 263.

6. A demurrer admits all the allegations of the complaint that are issuable and well pleaded. This rule is fundamental and requires no authority to support it.

J. C. ROBINSON, for respondent.

There is a misjoinder of defendants. *Wilson v. Castro*, 31 Cal. 427; 1 Daniel Ch. Prac. 342 and note, 345 and note. No one but Rosenthal is liable to plaintiff. Story on Part. pp. 276-7, 28, 1, 675. And then under the averment of the complaint Rosenthal is not liable on any copartnership settlement, but on an accounting as agent of the plaintiff and other defendants.

There is no partnership averred. *Bradley v. Harkness*, 26 Cal. 76; *Duryea v. Burt*, 28 id. 574.

There is no dissolution averred; only a sale of part interest in copartnership property, which constitutes no dissolution. This case is the same as *Bradley v. Harkness*, *supra*. A partnership does not terminate by sale of part of the property, etc. The remedy of plaintiff as to the smelter would have been by partition, and the bill or complaint is not sufficient for that.

There is no averment of any unsettled copartnership matter as to said mine, but that plaintiff severed his interest by sale, and that Rosenthal, as agent of the company, has in his hands funds of the others. Hence plaintiff's cause of action would be against Rosenthal for an accounting, by joining with him as plaintiffs the defendants other than Rosenthal. And in case they refused to join as plaintiffs, to make them defendants by averring their refusal to join as plaintiffs. Practice Act, sec. 19.

The complaint is so ambiguous and uncertain that it

cannot be understood therefrom whether said matter in relation to said smelter is intended as a separate and distinct cause of action from said matter as to said mine or intended as part of the same cause.

That the parties to an action as to said smelter would be different from said matter as to said mine, in this: there would be an action against Rosenthal by plaintiff and the other defendants; and as to said smelter it would be a bill for partition. Hence for said reasons the said demurrer was properly sustained.

WADE, C. J. This is an action in the nature of a bill in equity, wherein the plaintiff asks for an accounting as between partners and a sale of partnership property. There was a demurrer to the complaint, which was sustained, and the plaintiff appeals. We are called upon to pass upon the sufficiency of the complaint, which substantially alleges that the plaintiff and defendants, on and prior to the 26th day of November, 1878, were the owners as tenants in common of the Gagnon mine, situate in Summit Valley mining district, Deer Lodge county; that the plaintiff's interest in the mine was one undivided one-twelfth part thereof; that from the 10th day of October, 1877, to the 20th day of November, 1878, the plaintiff and defendants worked this mine jointly under a mining copartnership known as the Gagnon Mining Company; that the interest of the plaintiff and the several defendants in this mining copartnership was relatively the same as their interest in the mine, the plaintiff's interest being one-twelfth; that during the existence of said copartnership, the defendant, Joseph Rosenthal, acted as superintendent and treasurer of the company; that on the 26th day of November, 1878, the plaintiff sold and conveyed his interest in the mine to the defendants and thereby dissolved his relation as copartner in the company; that by the terms of the sale the plaintiff reserved his interest in and to all moneys



belonging to the company in the hands of the superintendent and treasurer; that at the time of said sale the company were the owners of a certain smelting furnace situate on Silver Bow creek, with the fixtures, machinery and tools connected therewith; that the plaintiff has never sold to the defendants, or to either of them, his interest in the smelter, tools and fixtures, and that since said sale the defendants have been in the sole use and occupancy of said property; that no accounting or settlement has ever been had of the transactions of the copartnership, nor has the defendant Rosenthal ever accounted to the plaintiff or to the copartnership for the money received by him as the superintendent and treasurer of the company; that all the books of account of the transactions of the company are in the sole and exclusive possession of the defendants, and that they refuse to have an account taken of the transactions of the copartnership. Whereupon, the plaintiff demands an accounting, a sale of the smelter, and that upon such sale and accounting a balance be struck, and that the amount found due to the plaintiff and defendants be decreed to them respectively.

To this complaint the defendants, by their demurrer, say: First, there is a misjoinder of parties defendant; that no one but defendant Rosenthal is liable to the plaintiff, and that under the averments of the complaint Rosenthal is not liable on any partnership settlement, but on an accounting as agent of the plaintiff and other defendants; and second, that the complaint is uncertain in this, as to whether the matter in reference to the mine and in reference to the smelter are intended as one cause of action, or as two separate causes of action.

1. In answer to the first proposition, it is sufficient to say that it is averred that the plaintiff and defendants, including the defendant Rosenthal, were partners, and that a court will not order a division between partners of partnership funds, in the hands of one of them, until an

accounting of the whole partnership transactions has been taken. *McRae v. McKenzie*, 2 Dev. & B. Eq. (N. C.) 232. An accounting being necessary as between the partners, before an action could be maintained by either of them for funds in the hands of the other, it follows that the plaintiff could not maintain an action against his partner Rosenthal, as the agent of the plaintiff and defendants. The plaintiff and defendants were partners, and their rights and liabilities must depend upon and be determined by that relation, and not upon the fact that partners are agents for each other. The first step towards authorizing one partner to sue another is an accounting between the partners. One partner cannot sue another for his share while the partnership accounts are unsettled. *Lawler v. Denton*, 9 Wis. 268; *Smith v. Smith*, 33 Mo. 557; *Ives v. Miller*, 19 Barb. 126; *Ozias v. Talman*, 1 Binn. 191; *De Witt v. Stanford*, 1 Root (Conn.), 270.

The averments of the complaint, that the plaintiff and defendants were partners; that all books of account of the transactions of the company are in the sole and exclusive possession of the defendants, and that they refuse to have an account of the transactions of the company taken, are sufficient to authorize the plaintiff to demand an accounting. And that is the only remedy. The averments that Rosenthal was superintendent and treasurer of the company are surplusage, and subject to be stricken out on motion. There is no misjoinder of parties defendant.

2. The objection that the complaint is ambiguous and multifarious is not well taken. It is contended that it cannot be ascertained from the complaint whether the pleader intended to make a case for a partition and sale of the smelting furnace and fixtures, or a case for an accounting between the partners. But, as before stated, the averments are proper and sufficient to authorize the plaintiff to demand an accounting, and this

whether the partnership had been formally dissolved or not; and if the complaint contains other and improper and insufficient averments as to another cause of action, this would not render the complaint ambiguous. If such other averments were improper, the most that could be said of them would be that they are surplusage, and such an imperfection in the complaint is not reached by demurrer.

Neither is the complaint multifarious. In order to support the objection of multifariousness, two things must concur: first, the different causes of action must be wholly distinct, and such as are not authorized to be united in one action under the code; and second, each cause of action as stated must be sufficient to sustain the complaint. Story's Eq. Pl. secs. 271*b*, 271, 284.

Tested by this rule, the objection of multifariousness disappears. The averments of the complaint are not sufficient to support an action for partition, or a sale of the smelting furnace and fixtures. Such an action could not be maintained until after an accounting as between the partners, and a settlement of the transactions and affairs of the partnership. One partner cannot rightfully demand a division, partition or sale of the partnership property and effects, until an account has been taken as between the partners, ascertaining and defining their respective rights.

3. We are not prepared to say that the averments as to the smelting furnace and fixtures are surplusage. They support the allegation that there was a partnership existing between these parties, and that as to the use of the furnace and fixtures while the same has been in the exclusive possession of the defendants there has never been an accounting.

The averments of the complaint are not sufficient to support an action against Rosenthal as superintendent and treasurer of the company, nor are they sufficient to support an action for the partition and sale of the smelt-



ing furnace and fixtures; but they are sufficient to support an action for an accounting as between the partners, and therefore the demurrer should have been overruled.

Judgment reversed and cause remanded for new trial.

*Judgment reversed.*

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**BROADWATER ET AL., respondents. v. RICHARDS, ADM'R,  
appellant.**

**APPEAL — Motion for new trial necessary to examination of questions of fact.**— When there was no motion for a new trial in the court below, the appellate court will not consider the evidence contained in the record on questions of fact. *Largey v. Sedman*, 3 Mont. 472, reaffirmed.

**APPEAL FROM PROBATE TO DISTRICT COURT — Powers of latter on such appeal.**— The district court being the appellate court of the probate court (see sec. 432 of Code of Civil Procedure), and having general jurisdiction, has the inherent power and authority to make any order in a case properly before it that the probate court could itself make.

*Appeal from First District, Custer County.*

THE briefs in this case and the one following seem to have been prepared as if for one case.

**FIRST APPEAL.**

H. N. BLAKE, for appellant.

In addition to the points and authorities on file in this cause, and insisting thereon, the following matters are presented for the consideration of the court:

This is an appeal from the judgment of the district court, pages 163, 164, of the transcript, setting aside a certain sale of property by the appellant, and making further orders in the premises.

1. The court below should have dismissed the appeal of respondents from the order of the probate court for all of the grounds therein stated. The appeal was taken by respondents from an order confirming, approving and

declaring valid a sale of certain property of the estate of Brooks, deceased. The only appeal allowed by the statute is under the fourth clause of sec. 432, Code Civil Procedure, which is as follows: "From an order directing the sale or conveyance of *real* property."

All the papers in the case fail to speak of any real property belonging to the estate of Brooks. No order has been made by the probate court concerning the sale of any real property by the appellant, and all he sold was personal property. The papers refer to a log building, which of itself is personal property. This court must take judicial notice of the fact that the land on which said building is situated is a part of the public domain that has been granted to the Northern Pacific Railroad corporation; and that the officers of the land department in Washington refused the application of the probate judge of Custer county, Montana, to enter Miles City under the town site acts of congress and this territory. A building, so owned by one party and situated on the public domain, can be removed by a person possessing the building, and is personal property, and there can be no question that such was the *status* of this log structure when the appellant sold it. *Antvine v. Belknap*, 102 Mass. 193; 2 Kent. Com. 12th ed. (445), 343, n. 1 and cases there cited; *Brown v. Sullie*, 6 Nev. 244; *Prescott v. Wells*, 3 Nev. 90; *Pennybecker v. McDougal*, 48 Cal. 160; *Hinckley v. Baxter*, 13 Allen, 139.

The statute of California, from which the Montana Probate Practice Act has been borrowed, defines the words "real property" to be "co-extensive with lands, tenements and hereditaments." Code Civ. Proc. sec. 17. The statutes of Montana say, "the words 'land or lands' and the words 'real estate' shall be construed to include lands, tenements and hereditaments, and all rights thereto and all interests therein." Cod. Stats. 389, sec. 1, clause 5. It will be seen from these definitions that the log structure referred to is not real estate.

2. Appeals are purely rights conferred by statute, and where the law grants none, a party has none. If the Probate Practice Act mentions appealable orders, all others are excluded. *Deer Lodge Co. v. Kohrs*, 2 Mont. 66; *In the Matter of Smith*, 51 Cal. 563; *Estate of Dunne*, 53 Cal. 631; *Blum v. Brownstone*, 50 Cal. 293; *Johnson v. Tyson*, 45 Cal. 257.

3. The order of the probate court, from which the appeal was taken, confirmed and approved a sale of personal property by the administrator. Transcript, 48.

No appeal was ever taken from the order authorizing the sale by the administrator. Transcript, 98. Yet the court below not only set aside this order, but directed the administrator to qualify and administer thereafter, and give notice, and allow parties to present their claims for allowance, etc. This action was erroneous. The court had no jurisdiction of any of these matters in this appeal. The order appealed from did not relate to these questions. Judgment, transcript, 163.

4. The order for the sale of the property by the administrator was binding until reversed. It was never appealed from and could not be legally set aside. *Estate of William Stott*, 52 Cal. 406; *Estate of Thos. Spriggs*, 20 Cal. 121; *Halleck v. Moss*, 22 Cal. 266; *Vantilburg v. Black*, 3 Mont. 459; *Garwood v. Garwood*, 29 Cal. 514.

5. Through no fault of appellant, and against his protest, the respondents have appeared in court without pleadings and submitted no issues. Appellant contends that all the evidence shows that the probate court could not reasonably and legally do any act, except confirm the sale by appellant. There is no conflict of testimony relating to the sole question before the court. The probate law has been complied with by the appellant.

6. The firm of Broadwater, Hubbell & Co. and George M. Miles were not creditors or heirs of the estate of Brooks, and could not control the acts of the administrator in making said sale. They were not interested in



the estate. The court below erred in refusing to sustain the motion of appellant to strike from the files the objections of these parties. *Garwood v. Garwood*, 29 Cal. 514.

7. The court below erred in sustaining the objections of respondents to certain questions propounded by appellant tending to show that certain records and papers of the probate court of Custer county had been lost, and the contents thereof. Those questions appear in the transcript, pp. 19, 20. The existence of a record showing the regularity of probate court proceedings may be shown by secondary evidence, if the original has been lost or destroyed. *Will of Warfield*, 22 Cal. 51-64; *Jackson v. Crawford*, 12 Wend. 533; *Ames v. Hoy*, 12 Cal. 11; 1 Greenl. Ev. sec. 509; Code Civ. Proc. sec. 609.

8. The court below erred in excluding the evidence tending to show that George M. Miles had no interest in the estate of Brooks. Transcript, 21, 22. If Miles had no interest in the estate as heir, creditor or otherwise, he could not be a party to these proceedings, and should be dismissed therefrom. The evidence offered showed conclusively that Miles had no interest in the estate.

9. The respondents claim that there was no probate court of Custer county at the times that some events in the history of this cause occurred. Appellant filed his application for the letters of administration January 7, 1879, and they were issued January 18, 1879. This court will take judicial notice of the action of the executive of this territory in organizing the county of Custer several months before the death of Brooks. There had been, in fact, a probate court of said county during these times, and a judge thereof. These acts of the executive were approved, as well as the acts of the officers of said county, by the legislative assembly. Statutes 11th Session, pp. 117, 100, which went into effect, respectively, January 21, 1879, and February 8, 1879. Laws of this character have been held valid. *Smith's St. and Const. Law*, sec. 267; *State v. Stephens*, 21 Kans. 210; *Rumsey*

v. *People*, 19 N. Y. 41; *Thomson v. Lee County*, 3 Wall. 327; *Laramie Co. v. Albany Co.* 92 U. S. 307; Cooley's Const. Limit. 371 *et seq.* and 254; *Lamming v. Carpenter*, 20 N. Y. 447; *People v. Maynard*, 15 Mich. 470; *Kneeland v. Milwaukee*, 15 Wis. 454.

10. There are two statutes authorizing appeals from the probate court. The Code of Civil Procedure, sec. 432, allows appeals to be taken to the district court. The Probate Practice Act allows them to be taken to the supreme court. Sec. 324. Both acts were approved February 16, 1877, but go into effect on different dates. Both courts cannot have jurisdiction of this appeal. The organic act contemplates that the supreme court should exercise appellate jurisdiction. If the Probate Practice Act governs this case, then the respondents should have appealed from the probate court to this court, and the district court never had jurisdiction of these proceedings.

HIRAM BLAISDELL, also for appellant.

In this case James R. Brooks died intestate about January 1, 1879, and Thomas Richards was appointed administrator of his estate by the probate court of Custer county. That said Richards made application for said appointment on the 7th day of January, 1879, and upon the 18th day of January, 1879, Richards received his appointment. His appointment and bond and oath appear of record. He has continued to discharge the duties of the trust until the May term of the Custer county district court for 1880, and since has acted in that capacity. In July, 1879, said Richards made application to said probate court for leave to sell certain property of said estate. The court appointed a time, gave notice of the hearing, and upon the hearing made an order of record for the sale of said property. Warner, one of these objectors, appeared at said hearing, but filed no written objections to the order being made, and the order, as made, stands unappealed from, and is in full force and effect. The admin-

istrator proceeded to sell said property under said order, and has reported his sale to the probate court for confirmation. He has also made a general report of all his doings in the premises to the probate court. The probate court appointed a time for the hearing of these reports, and at these hearings these objectors appeared and made the objections which appear on file in both hearings. The probate court confirmed the sale of said property, and allowed the account and report of the administrator, and directed distribution of the estate to be made according to its decrees on file. From these orders of the probate court the objectors appealed to the district court of Custer county.

At the May term, 1880, sundry motions were filed by the administrator's counsel, which will be considered hereafter. They were each overruled. The order of the probate court confirming said sale, and approving the account of the administrator, and ordering distribution, was set aside as null and void, and the administrator ordered to file a new bond, and to proceed to the readministration of said estate. The court also ordered that, in case a new bond was not filed, new administration should be granted. One of the objectors, Warner, had presented his claim to the administrator, and had it allowed. Miles, one of the objectors, had done the same, and it was disallowed, and no suit had ever been commenced by him upon the same, and his claim had become barred by the statute.

Broadwater, Hubbell & Co. never presented their claim until after the time allowed by statute had passed; then, at the hearing before the probate court, in March, 1880, it was for the first time presented to the administrator for allowance. Before the administrator had time to pass upon the claim it was withdrawn. The administrator filed his motions in the district court to dismiss both appeals, which the court refused. We insist these motions should have been granted, as the district court



had no jurisdiction of the subject matter of said appeals. If an appeal is allowed to the district court from the probate court, from the latter's orders, it must be by virtue of the statute only. None of the sections of the statute allow this appeal. See Code of 1877, p. 150, sec. 408; id. p. 158, sec. 432; id. p. 324.

These proceedings in the probate court were not judgments, and this is not a civil action. The probate court could only make an order, which it did, and from that order no appeal would lie to the district court. There were, indeed, no pleadings upon either side; no verification of facts and nothing upon which the court could render a judgment. No issue had been framed in the probate court, out of which any possible decision could arise, which would be the subject of review in the district court. See *Deer Lodge County v. Kohrs*, 2 Mont. 66, 71. When this decision was rendered, the statute of appeals was the same as now in respect to such cases. It nowhere appears that Miles and Broadwater, Hubbell & Co. have any interest in this matter, or in said appeal. The statute only allows those having an interest in the subject matter of the litigation to appear before the courts, and the courts will always require an affirmative showing of that fact to appear before they allow a party to be heard. See Code of 1877, p. 251, sec. 46; id. p. 255, sec. 64; id. p. 289, sec. 188; id. p. 290, sec. 190; id. p. 294, sec. 202; id. p. 307, sec. 258. Broadwater, Hubbell & Co. are not interested. They have never, as yet, had a claim allowed or disallowed by the administrator or probate court. They never presented any for such allowance except that which was withdrawn. Code of 1877, p. 277, sec. 150; id. p. 280, sec. 155; id. p. 280, sec. 157. They must first put themselves upon a footing which entitles them to become litigants. As yet, we have no authoritative knowledge that they have got any claim unpaid and in full force which entitles them to step in and arrest the whole course of this administration and stop

the proceedings; and unless an entire stranger without any interest can do this, Broadwater, Hubbell & Co. certainly cannot. There has yet been no adjudication for or against their rights; they have simply their affidavit to a claim about which no one has any official knowledge. Their statutory time to present the same has already passed, and they have no affidavit here bringing them within the exception of creditors who have not had an opportunity to prove their claims, that is, under Code of 1877, page 277, sec. 150. In fact the laws of Montana absolutely place Broadwater, Hubbell & Co. before this court in a position where this nor any other court can possibly recognize them as having a legal interest in this estate; their claim is forever barred by the limitation of law. George M. Miles, another of these objectors, is not in interest here. No proof of his claim was properly made to the administrator under section 154, page 279, of the laws of 1877. His claim was therefore disallowed, as is shown by the note itself, on the 1st day of April, 1879.

The records and files of this case fail to disclose that George M. Miles has commenced any suit at all to recover upon his claim since it was disallowed. See secs. 155-6, page 280, Code of 1877. He therefore has made no showing whatever which entitles him to be found here opposing and obstructing the course of administration on this estate. He has not, nor can he have, any possible interest in this estate. The statute of limitations has barred his rights to be found here under any circumstances whatever. Therefore this appeal should be dismissed as to the interest of Broadwater, Hubbell & Co. and George M. Miles therein, or the motions designated as Nos. 2, 3 and 4 granted. Will the court presume, in the absence of any proper affirmative showing, that Broadwater, Hubbell & Co. and George M. Miles have an interest shown here by this record which entitles them to be heard either here or in the probate or district court

below? The undertaking on appeal is insufficient which was given to remove the cause from the probate to the district court. See p. 158, sec. 432, Code of 1877; id. p. 159, sec. 438.

What are civil actions? See Code of 1877, p. 54, sec. 66; *United States v. Ensign*, 2 Mont. 398. The probate court found the value of Brooks' interest to be:

In the community property.....	\$308 00
In the individual property.....	138 00
Total amount in controversy.....	<u>\$446 00</u>

The amount of the bond is \$300 only, and the bond is not conditioned for the "prosecution of said appeals with effect," as required by the statute of appeals. The objections urged here do not come here, nor did they come to the courts below, properly authenticated. They are simply averments of facts, without any proof whatever of the truthfulness of the same, nor are they verified at all. The proceedings of the probate court and the administrator were supposed to be regular, and the burden of showing their irregularity was upon the objectors. They stopped the progress of administration upon certain grounds alleged in their objections. Upon these questions they held the affirmative of the issue, and they were lawfully bound to sustain their averments by competent proof introduced on their behalf, and by them, ere the court would demolish the actions of the administrator and require him to readminister upon the estate. The presumption is always in favor of the regularity of such proceedings, and not against them. Nevertheless, the district court rendered its judgment in the premises without any proof whatever on the part of the objectors in support of their objections.

The judgment was erroneously rendered. They have not sustained their objections by any competent legal proof. The receiving, filing and recording of the administrator's bond is sufficient evidence of its approval by the probate judge.



But, if the administrator's bond was insufficient, that does not render his acts unlawful. Third persons nor creditors cannot be supposed to look into the administrator's qualifications. The district court in effect decided that Richards was not administrator, but at the same time he went so far as to make an order for him to give a new bond. This the administrator was compelled to do to prevent paying over the moneys which have come to his hands, etc., under section 413, p. 151, Code of 1877.

The affidavit of George M. Miles proves nothing; no title to the lot in question is shown to have ever been vested in the town site company; no authority to the secretary or treasurer of said company to convey is shown; no conveyance is alleged, nor that the vendor ever placed Brooks in possession of the lot; nor that Brooks ever went into possession under and by virtue of the assumed purchase from Miles, as secretary and treasurer of the town site company. No evidence that Brooks owned or had any interest in the lot at the time of his death has been shown, or had possession even.

The question whether any real estate is involved in this estate can make no difference here. The estate of the intestate was less than \$500, and, under section 2, pp. 35 and 36, laws of Montana for 1874, could be sold in the same manner as personal property

Jesse F. Warner is not in a position to raise these objections. Warner admitted the right of the administrator to act as such by presenting his claim to him for allowance as such administrator, which, in fact, all these objectors have done. Miles, as well as Broadwater, Hubbell & Co., all have admitted the right and jurisdiction of the administrator to act in the premises; and while it is true Broadwater, Hubbell & Co. withdrew their claim, yet, having once submitted it, they and the other objectors are estopped now from claiming that the administrator had no authority to act.

Again: In selling this property, the sale of which is

sought to be confirmed, the administrator acted under an order of the probate court of Custer county, granted for that purpose, and when challenged to show his right to sell, and ask for confirmation, he is not obliged to go back further than that order. To that he can safely point for his authority. Warner appeared at that hearing, and, for the purposes of this trial, "all the world appeared and were parties."

The probate court pronounced its order for the sale of the property. Everybody had notice; the sale has been made in conformity thereto; no one has appealed from that order, and it is yet in full force, and unreversed. It is not only binding upon Warner, one of these objectors, who appeared at its granting, but it is binding upon everybody, unless impeached for fraud.

"To the orders of the probate court, like intendments shall be given, and to its records, judgments and decrees there is accorded like force and effect and legal presumptions as to district courts." See 10th subdivision, sec. 1, page 240, Code of 1877.

No parties can go behind that order; there is no inspection behind its force as a decree, save by the appellate power, and that has not been exercised. See *McWitt v. Turner*, 16 Wall. 365-6; 15 Curtis' Decisions of U. S. Sup. Court, 125, entire opinion; 20 Wall. 246, 250; 5 N. Y. 497.

If Richards has acted as administrator in good faith, that is sufficient. Letters of administration have been granted him, and they are yet unrevoked. He has acted under them, and until they are revoked his acts are valid. Sec. 107, p. 264, Code of Montana, 1877.

Again: It nowhere affirmatively appears but that Thomas Richards may be the public administrator of the county. The court has a right to infer that he is; at least as long as two classes of administrators exist, either are liable to perform the duties of the office. The court will not infer that he is not, and if he is, his acts are

valid. In *McWitt v. Turner*, 16 Wall. 363, the court arbitrarily presumed the administrator in that case to be the public administrator, although there was no affirmative showing of that fact. In all the cases cited the courts very thoroughly examined all the proceedings of the probate court, and based their decision upon the regularity of those proceedings.

As to officers *de facto*, see 20 Mich. 181, 182; 5 Wait's Actions and Defenses, p. 7.

The district court in this cause has so far recognized the administrator as to order him to give a fresh bond, which he has done. He has thereby acknowledged his due inception into the office.

Not having the other assignments of error before me, I am unable on my part to proceed further with this brief.

STREVELL & GARLOCK, for respondents.

Of the numerous errors, thirty-one in all, alleged by the appellant in this case, it will not be necessary to consider any except the first, second, third, fourth, fifth, sixth, fifteenth, sixteenth, twenty-eighth, twenty-ninth, thirtieth and thirty-first. All the rest, as will appear from the most hasty inspection of the record, are utterly without foundation in fact. They are in every instance allegations that the court below erred in rulings which the statement of the case, as settled and allowed, shows were not made at all. It does not appear that the question referred to in the seventh of appellant's specifications of error was ever asked upon the hearing had in the court below, or that any ruling was had upon it either adverse to the appellant or otherwise; nor do the questions referred to in appellant's specifications numbered seventeenth to twenty-sixth, inclusive, appear to have been asked at all; still less does it appear that there was any adverse ruling upon them of which the appellant here could complain; on the other hand, in specifications eighth and ninth the errors complained of are that the district court overruled questions put by appellants'



counsel, which the record shows were answered without objection.

It is at the same time assigned as error that the evidence offered by appellant and referred to in his specifications tenth to fourteenth, inclusive, was rejected on the hearing in the district court, while the record shows that it was in fact received without objection.

1. The appellant's first specification of error is to the effect that the district court erred in overruling his motion to dismiss the appeal of the respondents from the order of the probate court.

The general grounds upon which he relied in support of his motion were stated at length in his notice of motion as filed in the district court on April 2, 1880. See Transcript, p. 73. Exception having been taken to the decision of the court below in overruling the motion, it is to be considered whether any of the grounds assigned afford a sufficient reason why the appeal to the district court should have been dismissed, and the probate court allowed to proceed with the administration of the estate.

The first ground assigned was that the district court had no jurisdiction of the subject matter of the appeal. If by this it be meant that the district court has no jurisdiction in any case to review on appeal an order of the probate court of the character in question, then we submit that the objection that it has no jurisdiction of the subject matter of this appeal is entirely without foundation, for *in all cases* an appeal may be taken from any order of the probate court to the district court. Rev. Stats. U. S. sec. 1934.

No special provision is made by the Probate Practice Act regulating the manner in which appeals shall be taken to the district court; and for the manner in which the section of the organic act is to be carried into effect, we are referred to the act prescribing the mode of procedure in civil cases generally. Probate Prac. Act, sec. 324.

If the requirements of the Code of Civil Procedure

relative to perfecting appeals had been complied with, then the district court had acquired jurisdiction of the appeal.

The second and third grounds may be considered together. They are to the effect that the appeal was not taken pursuant to any law of this territory, and that there is no law authorizing an appeal from the order in question to the district court. We think the provision of the organic act already referred to would sufficiently sustain the appeal to the district court, but we are not without a law of the territory upon the subject. It is expressly provided that an appeal may be taken from the probate court to the district court from an order directing the sale or conveyance of real property. Code of Civ. Proc. sec. 432.

The order appealed from was one confirming the sale and directing the conveyance of certain property (see Transcript, p. 48), which the respondents, in their objections, alleged to be real property. Transcript, pp. 49-58.

It is true that the probate court had assumed to decide that it was not real property. Transcript, p. 45. But whether or not the property in question was real or personal, could only be determined by the district court upon a trial and hearing of the matters in controversy, and not upon a motion to dismiss the appeal. It will scarcely be contended that the probate court could take away the power of the district court to review its orders directing a conveyance of real property by simply finding as a fact that the property ordered to be sold was not real property.

Of the fourth and fifth grounds, that it did not appear that the respondents had any interest in the subject matter of the appeal or in the estate, or that they had any appealable interest, it need only be said that it was not necessary that the evidence of their interest should appear to entitle them to make their objections. In their

objections they alleged that they were interested as creditors; they had done more than that; they had filed affidavits in support of their objections, showing the character of their claims (Transcript, pp. 59-62); and so far as the respondent Warner is concerned, the records of the case upon which the appellant's motion was based showed all the time that he had a claim against the estate which had been presented and allowed. That they were in fact parties in interest could, if necessary, be proven upon the trial of the appeal, but they could not be deprived of an opportunity to show that they were interested, by a motion to dismiss their appeal before hearing.

The sixth ground of appellant's motion is based upon the alleged insufficiency of the undertaking on appeal to the district court. Transcript, p. 69. The condition of the undertaking is that the parties appealing will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, and so far is in full compliance with the law making provision for an undertaking on appeal in such cases. Code of Civil Proc. secs. 410-418.

The rule that the condition of the undertaking shall be that the appellant shall prosecute his appeal with effect, and that it shall be for a sum double the value of the property in controversy, does not apply to an appeal from an order of the probate court of the character of this one in question. Code of Civ. Proc. secs. 432, 435, 438.

The seventh ground of appellant was that there were no sworn pleadings or verified statement of facts filed by respondents as the ground for resisting the confirmation of the sale of the property of the estate. To this it need only be said that any person *interested* in the estate had a right to make objection to the confirmation of the sale, and the only requirement of the statute to entitle him to be heard thereon was that he should file his objections in writing. Probate Prac. Act, sec. 202.



The respondents' objections were mostly based upon matters appearing, or rather not appearing, but which they consider should appear of record in the probate court, relative to the estate, and so far as Broadwater, Hubbell & Co. were concerned, they filed affidavits showing that they were interested, and that they had a right to be heard in support of their objections.

We do not think it necessary to consider further the several grounds of appellant's motion in the district court to dismiss the appeal from the probate court. There can be no doubt that the respondents were entitled to be heard in the district court on their objections to the confirmation of the sale of the property, which afforded the only means of satisfying, even in part, their several claims, and that the decision of the district court, denying the motion to dismiss the appeal, was right.

2. The appellant's second specification of error, that the district court erred in overruling the motion of the appellant to dismiss the appeal from the order of the probate court, on the ground that the order appealed from was one confirming a sale of personal property, and the district court had not acquired jurisdiction, has been fully considered in what has been said in reference to the motion which has before been referred to. Whether or not it was an appeal from an order confirming a sale of personal property could not be determined upon a motion to dismiss the appeal. But even admitting that it was personal property, to the confirmation of the sale of which the respondents were objecting, still the probate court had found as a fact that a part of the property, at least, was partnership property, which deceased owned in common with one Riley, his surviving partner. Transcript, p. 45.

If that was the case, it would appear that Riley, and not the appellant, was the proper party to make the sale, and that the sale would require an order of confirmation. Probate Prac. Act, secs. 178, 299.

3. The third exception of the appellant is to the effect that the court below erred in refusing to strike the objections of all the respondents from the files; and the fourth, that it was an error for the court to refuse to strike from the objections the names of several parties composing the firm of Broadwater, Hubbell & Co., on the ground that it was not shown that the respondents were parties in interest. Transcript, p. —. That these exceptions cannot be sustained, we think has been sufficiently shown in what has already been said in reference to the motion of the appellant to dismiss the appeal from the probate court. That they are utterly groundless is apparent, when it is considered that no proceeding had in the probate court would bar any creditor of his claims, which will be considered hereafter.

4. Leaving the others, which can be more conveniently considered afterwards, we will consider the thirty-first and last specification of error. It is that the district court erred in its judgment and decree from which this appeal is taken. Transcript, pp. 163, 164.

The most hasty examination of the record in this case cannot fail to show that the proceedings had in the probate court were so entirely at variance with the plain requirements of the law governing the administration of the estates, that no court on appeal should for a moment tolerate or affirm them. There can be no doubt that the statutes in that regard contemplate, require, and were intended to secure, a careful, efficient and regular administration and disposition of the estates of deceased persons in the probate courts. Each act to be done in the course of the administration of an estate is carefully provided for, and public record required to be made of it. The probate court has been constituted a court of record, and it is expressly required that "all orders and decrees of the court or judge *must* be entered at length in the minute book of the court, and upon the close of each term the judge *must* sign the minutes." Probate Prac. Act. sec. 314.

There can be no doubt that this section of the statute is mandatory, and that a compliance with it cannot be dispensed with. It may be admitted, as suggested by the appellant in his brief, that if such record had once existed and had been lost or destroyed, its contents could be shown by secondary evidence; but there is nothing in this case which in any way tends to show that the orders and decrees, on the absence of which the respondents based their objections (Transcript, p. —), had ever been made by the probate court or judge.

The evidence adduced on the hearing in the court below shows conclusively that the probate court had never acquired jurisdiction of the matters on which it assumed to act. No docket had been kept by the judge of that court in all the earlier stages of the administration of this estate, or signed by him; nor is it anywhere pretended that the orders which should have been made at that time were ever entered and signed by the probate judge in a docket or elsewhere. He never did such a thing. The record in this case is conclusive upon those points.

The testimony of the witness John McBride, the probate judge at the time of the hearing in the court below, shows that there was no record of any proceedings in relation to the estate other than those which are referred to and set forth in the transcript in this case. Transcript, p. 21.

The respondents, in their objections which were made in the probate court, set forth their grounds and reasons for resisting the confirmation of the sale (Trans. pp. 49-62), and it is respectfully submitted that if the several grounds alleged had any foundation in fact, there was enough, and more than enough, to justify the order of the court below, from which the appeal is taken. That those objections had such foundation became so apparent on the hearing had in that court, that the case did not even proceed to the point of allowing the respondents to produce evidence in support of their objections. It was



apparent that not the first foundation had been laid for a legal administration of Brooks' estate; that the probate court had never taken the steps requisite and necessary to give it the power to effectually dispose of his property.

Article 4 of chapter 3 of the Probate Practice Act provides the manner in which administrators shall be appointed. It is there provided that the applicant for letters "must state the names, ages and residence of the heirs of the decedent," when known to him, in his petition (sec. 61); that "letters of administration may be granted at a regular term of court or at a special term appointed by the judge for the hearing of the application" (sec. 62); that "when a petition praying for letters of administration is filed the clerk *must* give notice thereof at least ten days before the hearing" (sec. 63); that "on the hearing, it being first proved that notice has been given, the court *must* hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto" (sec. 65); and that "an entry in the minutes of the court that the required proof was made and notice given shall be evidence of the fact of such notice." Sec. 66.

The second, third, fourth, fifth and sixth of the respondents' grounds of objection are directed to the fact that none of these plain requirements of the law had been complied with. Transcript, pp. 51, 52.

The petition nowhere states the names, the ages or residence of the heirs of Brooks, or that the same were not known to the petitioner. It nowhere appears that letters were granted to the appellant at a regular term of the probate court, nor does it appear that any special term was ever appointed for the hearing of his application. It nowhere appears that the notice required by section 63, of the hearing of the application, was given, unless the affidavit of Carmichael, made after he had been suspended from the office of probate judge, furnishes evidence of that fact. Transcript, pp. 123, 124.

But we submit that that affidavit is not evidence that such notice was given. Section 66, before referred to, requires that it should be shown by an entry in the minutes of the court, and we submit that such entry in the minutes cannot be dispensed with. The court could not in any case acquire jurisdiction to order the issuing of letters of administration unless the required notice had been given, and the right to property acquired through the administration of estates would be dangerously insecure if the facts which give the probate court jurisdiction to confer the power of administration should be allowed to stand upon any but the record evidence, which the statute plainly contemplates. There is nothing, except the affidavit just referred to, which in any way tends to show that any hearing was had in the probate court on the appellant's petition, as required by sec. 65. If any order or decree had been made directing the issuing of letters of administration to appellant, it might perhaps be assumed that such hearing had been had; but all the evidence tends to show no such order was ever entered. An attempt was made to show that there had been such an order, and that it had been lost, but the probate judge, McBride, who was the only witness who testified on that point, says positively that he knows nothing about the existence of any such order. Transcript, p. 20.

It was shown on the hearing in the court below that no such order then existed, and there was no evidence that it had ever been made. There was, then, no foundation upon which the action of the appellant, as administrator of the estate, could be supported. The issuing of letters to him by an *ex officio* clerk of the probate court, and his taking the oath and executing a bond, could not constitute him an administrator and give him the power to take possession and dispose of Brooks' estate in the absence of an adjudication and orders of the probate court to that end. The appellant could no more acquire a right to hold

and dispose of the property belonging to the estate of Brooks, without an adjudication upon his right so to do, than he could in Brooks' life-time have acquired a right to hold and dispose of the same property in the absence of an adjudication by, and process of, a competent court. The order or decree for the appointment of an administrator, the qualification of the person appointed, and the issuing of letters to him, are all necessary proceedings to invest him with the office of administrator of an estate. No one of these can be dispensed with. *Estate of Hamilton*, 34 Cal. 464; *Estate of Frey*, 52 Cal. 658.

The ninth of the objections of the respondents is to the effect that the appellant had not qualified as administrator of the estate of Brooks, in that the sureties upon his bond had not qualified as required by law, and that the bond had not been approved by the probate judge. Transcript, pp. 53, 111, 113.

Until the sureties upon his bond had justified, and it had been approved by the probate judge, the right to administer upon the estate could not vest in the appellant. Probate Prac. Act. sec. 80; *Estate of Hamilton*, *supra*. But even if there had been an order or decree of the probate court appointing the appellant administrator, and he had undertaken to qualify, still it is submitted that such proceedings would have been void and ineffectual for any purpose. The petition of the appellant bears date January 7, 1879, and he attempted to qualify January 18, 1879, as shown by the date of his oath and bond. Transcript, pp. 109, 110.

There could have been no court in Custer county, at this time, competent to make an order or decree granting administration upon Brooks' estate. And respondents' first objection was directed to that point. Transcript, p. 51. Under the statutes then in force, the territory which now constitutes Custer county was, for judicial purposes, attached to the county of Gallatin. The probate court



of the latter county was the only one which could have acquired jurisdiction to administer upon Brooks' estate. It was not until February 8, 1879, that there was any law authorizing the holding of courts within the county of Custer. Laws of Montana, 1879, p. 100.

For any one to assume to act as probate judge of Custer county, or hold a probate court there, was contrary to the express provisions of the statutes of the territory. Cod. Statutes Montana, pp. 432-585; Laws Montana, 1877, p. 425.

Any order by a probate court within Custer county appointing the appellant administrator of Brooks' estate at the time mentioned, must have been void, as being in contravention of the statutes referred to. In support of this, we respectfully refer the court to the appellant's brief in the case of *McCormick v. Kelly and Hubbell*, submitted at this term. The administration of this estate was then without a valid inception, and all the subsequent acts of the appellant as administrator without foundation, unless it was validated and made effectual by the act which took effect January 21, 1879. Laws Montana, 1879, p. 117.

But it is well settled that a void order or decree, and the acts done under it, cannot be validated by subsequent legislation. Retroactive laws cannot validate void judgments and decrees. A decree made by one assuming to act as probate judge in Custer county at that time could not serve as a basis to give the appellant the right to dispose of this estate. *Pryor v. Downy*, 50 Cal. 388-400. The tenth and eleventh of respondents' grounds of objection (Transcript, p. 53) were well taken.

The order purporting to be an order for the appointment of appraiser does not furnish any evidence of its ever having been made at any time. It is simply a blank order, without date or signature of court or judge. Transcript, p. 114.

Nor does the inventory on file contain any reference to

the debts due the decedent, or of any partnership property in which he had an interest (Transcript, p. 103), although the very property, to the confirmation of the sale of which the respondents object, was afterwards found by the probate court to be partnership property. See Order of Probate Court, Transcript, p. 45. These are all plain requirements of the law, with which a compliance is necessary before an administrator can complete a sale of real property belonging to the estate. Probate Prac. Act, secs. 118, 120, 187, 199.

The notice to creditors of the deceased to present their claims to the appellant with the necessary vouchers was not printed in a newspaper published in Custer county. Yet there does not appear to have been any order of the probate court or judge directing the publication of such notice elsewhere. There was no order of that court designating any newspaper in which the notice should be published; still less the number of times of its publication. There is no evidence that it was ever published at all. See Transcript, p. 105.

There was no order or decree of the probate court showing that notice to creditors had been given, and the respondents allege that, by reason of the failure of the court to make such order, they never had any notice to present their claims. Transcript, p. 54.

It will scarcely be contended that the claims of the respondents could be barred, and a sale and distribution of the property of the estate be had, before these things had been done. The orders referred to *must* be made and the notice *must* be given. Probate Prac. Act, secs. 147-149.

Finally, it is objected by the respondents that the appellant, in dealing with the property of Brooks' estate, had treated that which is real estate as personal property. The affidavits attached to the respondents' objections sufficiently indicate the character of the property in question. Transcript, pp. 57-66.

The bid of the purchasers of that property shows that

they considered that they were buying real estate and not personal property. Transcript, p. 96. There is nothing in the record from which this court can find that the property in question is personal property. The record shows that it was a building which was permanently attached to the lot referred to in the record. That being the case, it must be assumed that it was realty until the contrary is shown. The court cannot take judicial notice, as suggested by the appellant in his brief, that the land is a part of the public domain, which has been granted by congress to the Northern Pacific Railroad Company, and that an application to enter it under the town site laws had been refused. The fact that the land is embraced within the limits of a grant must, if such fact exists, be proven as any other fact, and the records of the general land office must be proven as other records.

The definition of the term "real estate," furnished by the statute referred to by appellant (Cod. Stats. Montana, 1872, p. 389, sec. 1, clause 5), is, we submit, sufficiently comprehensive to include the property in controversy, even if its *status* could, as it cannot, be found to be as suggested by the appellant's brief. It is there enacted that the words "real estate" shall be construed to include lands, tenements and hereditaments, and all rights thereto and all interests therein. The petition of appellant for an order to sell describes the property as "a certain building and tenement, with the fixtures thereto attached." Transcript, p. 118.

If anything further was wanting to show that the property was real estate, an opportunity should have been given the respondents to show it on the hearing in the district court. As it was, the decision appealed from was made before allowing them that opportunity. It is not necessary to further call attention to defects in the proceedings by which a sale and transfer of this property was attempted. The requirements of the statutes for a sale of real property are so essentially different from



those which the probate court sought to follow in its attempt to dispose of what it was pleased to call personal property, that the proceedings had for that purpose could not be held to be of any effect, even if the proceedings in the earlier stages of the administration of this estate had been in conformity with the requirements of law. The point is raised by appellant in his brief, that the court below had no jurisdiction to order, among other things, that the administrator should qualify and thereafter administer the estate, giving notice and allowing creditors to present their claims. Transcript, p. 163.

The order of the probate court appealed from was one confirming a sale of property, and directing conveyance to be made; and we submit that, if the district court found that the sale was invalid for the reason, among others, that these things had not been done, it had a right, in the exercise of its supervisory powers over the probate court, to direct that they should be done. If it was necessary that these things should be done in the probate court before a valid sale of the property of the estate could be made, the probate court would of necessity have to see to it that the law in that regard was complied with, whether the district court so ordered or not. But even if it were admitted that the district court exceeded its jurisdiction, that would not necessitate a reversal of its order; the order could be so modified as to simply vacate and set aside the order of the probate court appealed from. Code Civ. Proc. sec. 428.

5. It is submitted that the ruling of the court below referred to in the fifth and sixth assignments of error was correct. The best evidence as to who had acted as administrator would be the records of the probate court. The fact that appellant had so acted, in the absence of record evidence that he had been appointed and qualified, would amount to nothing. The question referred to in the sixth assignment of error was too general; it does not refer to any records which are shown to have any

bearing on this case. But if the court below erred in the rejection of evidence, advantage should have been taken of it by a motion for new trial. No motion for that purpose was made, and the question as to whether the court erred cannot now be raised on appeal. The same may be said of the fifteenth and sixteenth specifications. Transcript, p. 32.

Besides, the fact that the claim of one of the respondents, Warner, has been allowed (see Transcript, p. 140) cannot affect his right to object to the invalidity of the proceedings in the probate court; and if no proceedings have been had to bar the claims of creditors, the respondent Miles still has an interest in the estate.

6. The twenty-eighth, twenty-ninth and thirtieth specifications of error are directed to the alleged failure of the court below to make and file findings of fact and conclusions of law, as requested. The record shows that such a request was not made until some time after the hearing and submission of the case, in fact not until after the order appealed from had been made. Code Civil Proc. sec. 270.

It is respectfully submitted that the order of the district court should be affirmed.

WADE, C. J. This is an appeal from a judgment of the district court setting aside an order of the probate court of Custer county, approving the accounts of Thomas Richards as administrator of the estate of James R. Brooks, deceased, and directing that the administrator, within thirty days from the date of the rendition of the judgment, file with the probate judge a good and sufficient bond as administrator, and before so doing that he retain in possession the money belonging to the estate, and thereupon qualify as administrator according to law, and proceed legally to the administration of the estate, supplying all omissions in the probate record, and giving notice to all persons to file their claims against the es-

tate; and that upon failure to file such bond, the letters of administration will cease, and the said Richards be removed from his official position; and in case of such failure, that he pay into the hands of the clerk of the court all moneys which have come into his possession as such administrator, and that the cause be returned to the probate judge for proceedings in accordance with this judgment.

1. There was no motion for a new trial, and hence we cannot look into or review the evidence contained in the record. We have frequently decided that questions of fact cannot be examined if there is no appeal from an order granting or refusing a motion for a new trial. *Alport v. Kelley*, 2 Mont. 343; *Chumasero v. Viall*, 3 Mont. 376; *Largey v. Sedman*, 3 Mont. 472.

The only question properly before us for consideration, therefore, is whether the judgment is such an one as the district court had jurisdiction to render. Under sec. 432 of the code, appeals from the probate court to the district court are authorized from orders made on the settlement of administrators. An order approving or disapproving the account of an administrator is in the nature of a judgment, and an appeal from such an order or judgment brings the whole case before the district court for review and adjudication. It may affirm or set aside such an order. It hears the case upon the proofs, and renders judgment as in other cases. The party against whom the judgment is rendered may appeal from the judgment, or he may make a motion for a new trial, and from the order granting or refusing the same an appeal lies to this court, which brings with it the evidence for review.

2. In the absence of any testimony that we can take into consideration, it must be conclusively presumed that the judgment was rendered upon competent and sufficient proofs. And it is fairly to be inferred from the judgment that the testimony established: First. That there



was a properly constituted probate court of Custer county, from which an appeal to the district court might have been taken. Second. That the records of said probate court were defective in failing properly to show the appointment of an administrator upon the estate of deceased. Third. That said administrator had failed to qualify as provided by law. Fourth. That he had failed to give the necessary bond; and fifth. That he had not given notice to the creditors of the estate as required by law.

And so it seems that the administrator appeared in the district court, with no letters of administration showing his authority, and with no bond or oath showing his qualification as administrator, with no proof of notice showing that he had notified the creditors of the deceased to present their claims against the estate, but with money in his hands belonging to the estate, and praying that his accounts as administrator be approved, and that he be ordered to make distribution and be discharged from his trust.

Under such a state of facts, what had the court jurisdiction and authority to do in the premises? The case was in the district court. It had obtained jurisdiction over the subject matter and the parties. For the time being the probate court had lost its jurisdiction. After the appeal, it had no authority to change or modify its decree. The case had passed out of its jurisdiction. It had adjudged the administrator duly qualified and authorized. It had ordered him to make final distribution of the estate. This adjudication and order came before the district court for review. Looking at the judgment in that court, it must have found that the administrator had not been legally appointed and had not properly qualified. But he was in that court. He had moneys in his hands belonging to the estate. It was necessary that this money be protected for the benefit of those entitled to receive it. It was necessary that this protection be

afforded then and there. The district courts of the territories are courts of general jurisdiction. They are clothed with chancery as well as common law powers, and having acquired jurisdiction of a case for one purpose, they may retain it for all purposes. To have done no more than to have reversed the order approving the accounts of the administrator would still have left this money unprotected. No doubt the district court might have ordered the probate court to cause the administrator to give a bond, and what the district court had authority to order the probate court to do in the premises, it might well do itself. The district court being the appellate court of the probate court, and a court of general jurisdiction, it has the inherent power and authority to make any order in a case properly before it that the probate court might make in the same case.

It follows, therefore, that the judgment of the district court did not exceed its jurisdiction, and the same is affirmed with costs.

*Judgment affirmed.*

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**BROADWATER ET AL., respondents, v. RICHARDS, ADM'R,  
appellant.**

**PROBATE COURTS**—*What constitutes an action.*—The proceedings for the sale of real estate of an intestate are in the nature of an action, of which the presentation of the petition is the commencement, and the order of sale is the judgment.

**LIMITS OF ADMINISTRATOR'S AUTHORITY.**—An administrator has no authority to sell real estate except by an order of a properly constituted court, properly issued, with which he must strictly comply.

**WHO MAY OBJECT.**—Any person interested in the estate may file objections to confirmation of sale, and produce evidence on hearing to support the same.

**WHAT IS ADMISSIBLE ON TRIAL DE NOVO.**—A case appealed from probate to district court, being tried *de novo*, the objectors may present any evidence pertinent to the objections, though not raised on trial in the court below.

EXTENT OF JURISDICTION.—The district court may inquire, on such appeal, into any competent matter affecting the acts or authority of the administrator, including the proper constitution of the court itself, and the qualification of the judge thereof.

Where, upon an appeal from an order of the probate court affirming the sale of real estate, such order was set aside after hearing by the district court, and there was no motion for a new trial, the supreme court will not examine the evidence, though contained in the record, but will presume that the evidence sustained the findings and judgment of the district court.

### *Appeal from First District of Custer County.*

THE same attorneys appear in this as in the preceding case, and the briefs seem to have been prepared with reference to both cases. See briefs in that case.

#### SECOND APPEAL.

H. N. BLAKE, for appellant.

In addition to the points and authorities on file in this cause, and insisting thereon, the following matters are presented to this court:

This is an appeal from the judgment of the district court (Transcript, 151, 152), disapproving the account of the administrator and making further orders in the matter.

1. Upon all the questions involved in this appeal which are similar to those raised in the first appeal of these parties, counsel refer respectfully to the briefs and arguments on file therein. These are the following:

a. The appeal of respondents should have been dismissed by the court below.

b. The firm of Broadwater *et al.* and George M. Miles had no interest in the accounts of the appellant, and could not appear as parties herein.

c. The court should have admitted evidence tending to show the loss of records belonging to the probate court of Custer county.

d. Custer county had a probate court in January, 1879, and the acts of its judge have been declared valid.



2. Appellant maintains that the judgment of the court below should be reversed for the following additional grounds: The court exceeded its authority in making an order that the administrator should give a bond, qualify as administrator, supply all omissions in the probate court, give notice of filing claims against the estate, and, upon failure to give such bond, pay to the clerk of the district court money in his hands as administrator; and also in ordering that the appellant should be removed from his trust on failure to file such bond.

It appears from this judgment (pages 151 and 152 of transcript) that the court below found that appellant had been duly appointed administrator of the estate of Brooks. No orders of the probate court had ever been appealed from, except one confirming the sale of the property of the estate, which is the subject of the first appeal. The court below could only consider the questions raised by the order appealed from, confirming and approving the account of the administrator. All the evidence before the court below is contained in the transcript.

The judgments or orders of the probate court in which an appeal is allowed and not taken by aggrieved parties, and those in which no appeal is allowed by law, are binding upon all parties, and cannot be attacked collaterally. Prob. Practice Act, 1877, sec. 1, clause 10; *Garwood v. Garwood*, 29 Cal. 521; *Pico v. De la Guerra*, 18 Cal. 430; *Irwin v. Scriber*, 18 Cal. 499.

3. Letters of administration cannot be attacked collaterally by showing that probate court had no jurisdiction. *Irwin v. Scriber*, and cases cited, 18 Cal. 499.

4. The effect of the judgment appealed from is to allow Broadwater *et al.*, who have neglected to present their claims against the administrator, a right to do so now, when the time fixed by law expired before they appeared in these proceedings.

The acts of the administrator cannot be attacked in

this way. Claims that are allowed, or acted on and not allowed, are judgments, which the court below could not reverse. *Deck's Estate v. Gherke*, 6 Cal. 666; *Pico v. De la Guerra*, 18 Cal. 430; *Kingsley v. Miller*, 45 Cal. 95; *Brummagine v. Ambrose*, 48 Cal. 366.

5. It cannot be determined on this appeal that the probate court erred in fixing the value of Brooks' estate, or the amount of the administrator's bond, and the judgment appealed from is therefore erroneous. *Lucas v. Todd*, 28 Cal. 182.

6. All the evidence being before this court, and the respondents having the affirmative in attacking the accounts of the administrator, we claim that the judgment of the court below is not only contrary to law, but against all the evidence. No testimony was offered that showed any irregularity or fraud on the part of the administrator. No mistake or error was shown in his accounts. Some original papers are lost, but true copies were in evidence, and the rights of no persons have been injured by the loss of these records. The order of the probate court should have been affirmed. Why should the work of administration be done again? The clerk of the district court has no right to hold moneys belonging to the estates of deceased persons or administrators. The probate court is the only tribunal that can require an administrator to execute a new bond, or revoke his appointment. All of these things the court below assumed jurisdiction of. No questions of this nature were before it, and the only matter related to the approval or rejection of an account. The court could not decide this subject arbitrarily. The presumption being in favor of the performance of duty by the administrator, we insist that, in the absence of all evidence to the contrary, the account of the administrator should be adjudged correct.

WADE, C. J. Proceedings for the sale of the real estate of an intestate are in the nature of an action, of

which the presentation of the petition is the commencement and the order of sale is the judgment. *Sprigg's Estate*, 20 Cal. 121.

The administrator has no authority over the real estate of an intestate, except to sell in pursuance of an order of sale properly issued. Having no general authority, he must strictly comply with the order.

After an administrator has made and returned into court a sale, any person interested in the estate may file written objections to the confirmation thereof, and may produce witnesses and be heard in support of his objections. Probate Practice Act, sec. 202.

From the judgment or order of the probate court, confirming or setting aside the sale, an appeal may be taken to the district court. Authority for such appeal is found in the four hundred and thirty-fifth section of the code, and by virtue of the four hundred and thirty-sixth section thereof, such case, when it reaches the district court, shall be tried *de novo*. Upon the trial in the district court, any matter, legitimate and pertinent to the objections raised by the objectors, and not concluded by the judgment ordering the sale, may be inquired into and determined. In order to justify the sale, the administrator must come with full authority, and show that the sale has been in all respects legally made. Upon hearing the objections to the sale, the court may, if the matters involved therein have not been passed upon in granting the petition for the sale, inquire into the establishment and authority of the court issuing the order of sale; into the validity of the appointment of the administrator; whether he has qualified as the law provides, by giving the required bond, taking the necessary oath, and giving the proper notice of his appointment, or into any other competent matter affecting the acts or authority of the administrator. And as the case is tried *de novo* in the district court, and as new and original papers may be filed therein, and the cause tried therein as if it had



been originally instituted in that court (sec. 444, Code of Civil Procedure), objections may be raised therein for the first time.

Before a sale may be confirmed, it must appear to the court that the same has been legally made. Probate Pr. Act, sec. 203. And so, if the administrator has failed to show that the court appointing him was legally constituted and authorized, or that letters of administration were duly issued, or that he has qualified according to law, or that notice of his appointment or of the sale was given according to law, or that the property was appraised and sold as the law directs, then the confirmation cannot take place.

Ordinarily, when in and about the administration of an estate everything has been regular, and the authority of the administrator unquestioned, the confirmation of a sale is much a matter of form, and inquiry upon a hearing for that purpose extends no further than to see that the order of sale has been complied with, and that the sale has taken place in all respects as the statute requires. But in a case where the appointment and qualification of the administrator is disputed, and the authority of the court appointing him is questioned, as they may be on such hearing, it becomes the duty of the district court, wherein the case is tried as if an original action, to determine and adjudicate the questions so presented, to the end that the statute which requires that a sale, before it shall be confirmed, must appear to have been legally made, shall be complied with. A sale cannot be legally made except by one having authority. To give an administrator authority, he must have been duly appointed by a court having jurisdiction and legally constituted, and when so appointed, he must have strictly complied with the law in and about making the sale.

1. This is an appeal from a judgment of the district court setting aside an order of the probate court confirming a sale of property by an administrator. The respond-

ents appeared in the probate court, and also in the district court, and objected to the confirmation of the sale, which objections are in substance as follows: First. That at the time of the pretended appointment of Richards as administrator of the deceased there was no legally constituted probate court in Custer county having authority to make such appointment. Second. That there was no order of any court in Custer county appointing said administrator. Third. That there was no notice given by Richards of his intention to make application to be appointed administrator. Fourth. That there was no legal evidence that the probate court of Custer county ever granted letters of administration to Richards; that his bond as administrator was never approved by the probate judge, and that the sureties never justified as required by law. And fifth. That the creditors of the estate were not properly notified of the pendency of the petition or the appointment of the administrator.

Thereupon the administrator moved the court to strike off said objections, for the reason that it did not appear that the objectors were creditors of the estate, or in any way interested therein, which motion was overruled. A trial ensued, and, after an examination of the proofs, the court rendered judgment that the cause and all the papers therein be returned to the probate court; that the administrator's report of sale be disapproved, and the sale set aside as null and void; that the administrator proceed to legally qualify as required by law, and settle the estate, giving notice of the adjudication of claims and allowing all parties to present their claims for allowance. From this judgment the administrator appeals to this court.

There was no motion for a new trial, and hence we cannot look into the evidence contained in the record or examine any of the questions raised therein. For the purposes of the case we must conclusively presume that the evidence supports the judgment, and that the objections to the confirmation of the sale were sustained by

the proofs, or that some one of them, fatal to the sale, was so sustained.

The judgment as rendered was within the scope of the jurisdiction and authority of the district court. See *Broadwater et al. v. Thomas Richards, Adm'r*, decided at this term.

As we are to presume that the judgment of the district court is supported by the proofs, so we are to presume that the judgment of the probate court was not supported by the proofs. If the probate court was properly constituted and authorized, it had jurisdiction to render just such a judgment as was rendered in the district court, and should have done so on the same testimony; and if this judgment would have been legal and proper in the probate court, then the appellate court of the probate court, being a court of general common law and chancery jurisdiction, had authority to render the same judgment, and the judgment that the probate court ought to have rendered.

*Judgment affirmed, with costs.*

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McCORMICK, respondent, v. HUBBELL ET AL., appellants.

DEFENSE OF SURETIES.—Sureties on an appeal bond or undertaking cannot go behind the judgment to set up any matter of defense of their liability which might have been pleaded or shown in the original action, such as that the inferior court was improperly constituted or the judgment improperly rendered therein.

TRIAL DE NOVO.—Cases appealed from probate to district court, under the Montana statute (see Code, sec. 436), are tried *de novo*, and all irregularities and infirmities in the inferior court become immaterial.

An appeal from the probate court of Custer county to the district court of the same county, taken September 28, 1878, was good, though no district court was established in that county prior to February 8, 1879, being before that time attached to Gallatin county for judicial purposes.



VERBAL REPRESENTATIONS.—The liability of sureties is not affected by any verbal representations as to the contents or effect of an instrument when they have had full opportunity to see and judge for themselves.

Remedy for misconduct of jury and irregularity in entering judgment should be by motion for new trial. They cannot be reached in a collateral attack upon such judgment.

DEFENSE OF COVERTURE.—The defense of coverture in the defendant in the principal action cannot be raised by sureties in an action brought on the undertaking on appeal.

### *Appeal from First District, Custer County.*

WARNER & GARLOCK, for appellants.

1. The motion of plaintiff to strike out sections 1, 2, 3, 7 and 8 of the appellant's answer, on the ground that the same was irrelevant and immaterial, should have been overruled. The order of the court below sustaining that motion is erroneous for the reason that the parts stricken out contain allegations which, if proved on the trial, would have been sufficient to defeat a recovery by the plaintiff in this action.

It is provided that "upon an appeal from a judgment the court may review . . . any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment." Code of Civil Proc. 156, sec. 425.

An order of the court, by which matter that is a good defense is struck out of the defendant's answer, is an intermediate order involving the merits and necessarily affecting the judgment, and may therefore be reviewed on an appeal from the judgment. *Rapalee v. Stewart*, 27 N. Y. 310; *Ayers v. Western R. R. Co.* 45 N. Y. 260; *Hibberd v. Smith*, 39 Cal. 145; *Agard v. Valencia*, id. 292.

*First.* The plaintiff in his complaint alleges, as the foundation of his claim, that on the 28th day of September, 1878, judgment was rendered by the probate court for Custer county, Montana territory, in favor of

the plaintiff, in an action of *Burton v. Young*, and that the undertaking on appeal, on which this action is brought, was given on an appeal by the defendant Young from that judgment. The appellant, in the first section of his answer, alleges, in defense of this action, that at the time of the alleged rendering of the judgment in that action that the county of Custer was an unorganized county, and that there was no probate court or probate judge of Custer county, as alleged by plaintiff in his complaint.

Under the organic act and statutes of Montana the legislative assembly has exclusive power to provide for the organization of new counties. The only legislation which had been had in regard to the county of Custer, previous to the time of the alleged rendering of the judgment in the case of *Burton v. Young*, was the act defining the boundaries of the county of Big Horn, and attaching the same for legislative and judicial purposes to the county of Gallatin, and the subsequent act of 1877 changing the name of the county from Big Horn to Custer. Codified Statutes of Montana, 1871-72, pp. 432, 585; Laws of Montana, 1877, p. 425.

Under the statutes of Montana at the time of the alleged rendering of the judgment in *Burton v. Young*, the territory described as the county of Custer had not yet become a county. To constitute a county something more is required than a law defining its boundaries. Some provision must be made for a local government. *People v. McGuire*, 32 Cal. 140; *People v. Johnston*, 6 Cal. 673; *Commonwealth v. Fowler*, 10 Mass. 290; *McCullough's Appeal*, 34 Pa. St. 248.

• Under the laws then in force the probate court of Gallatin county had jurisdiction within the county of Custer, and, so far as the existence of a probate court was concerned, the latter was, to all intents and purposes, a part of the county of Gallatin. There was no more justification for the existence of a probate court in Custer county,

as distinct from that of Gallatin, than there was for the existence of two probate courts in Gallatin alone.

But it appears from the record that there had been an assumption of judicial power by what was styled the probate court of Custer county. That one Carmichael had taken it upon himself to hold what was called a probate court, and had assumed to enter judgment in the case of *Burton v. Young*.

It would hardly seem necessary, under the circumstances, to argue that a judgment thus entered was of no force or effect.

It is undoubtedly a well settled rule of law that when an office has been established and is already in existence, and where such office is filled by a person who exercises the powers and performs the duties of the same, that the right of such person to the office cannot be delegated in controversies between third parties, but must be tried in a proceeding directly instituted for that purpose. The right of a *de facto* officer cannot be questioned in a collateral proceeding. But in order that there may be an officer *de facto*, it is at least necessary that there be an actual office. Whereas in this case the office of probate judge had no existence in law, and was in fact in violation of a positive statute. We submit that the party assuming to act does not become an officer *de facto*.

We submit that, under such circumstances, a party is not precluded from denying the validity of a judgment where the law itself makes no provision authorizing the establishment of the court which assumed to render it.

The judgment in the case of *Burton v. Young*, in the probate court, was absolutely void, and may be attacked in this action. *Bruner v. Porter*, 9 How. 235; *Forsyth v. United States*, id. 571; *Hickman v. Jones*, 9 Wall. 197; *Bates v. Gage*, 40 Cal. 183; *Norwood v. Kenfield*, 34 Cal. 329; *Whitwell v. Barber*, 7 Cal. 54; *Forbes v. Hyde*, 31 Cal. 342; *Galusha v. Butterfield*, 3 Ill. 227; *Orman v.*



*Riley*, 16 Cal. 186; 4 U. S. Digest, 59, sec. 321; id. 55, secs. 215, 216; id. 71, sec. 562.

That judgment being void, it could not serve as a sufficient foundation to bind the sureties upon an undertaking upon an appeal. To constitute a sufficient consideration upon which to support the promise of the sureties to an undertaking upon appeal, it is necessary, first of all, that a judgment should have been rendered which was capable of being enforced.

When it turns out that the judgment appealed from was no judgment at all, the undertaking given on appeal from it is clearly without a consideration to support it, and should not be enforced against the sureties.

We submit, then, that the first section of appellant's answer constituted a good defense to this action, unless the action of the legislative assembly, subsequent to the time of the alleged rendering of the judgment in *Burton v. Young* in the probate court, had the effect to cut off the right of controverting the authority of a court which existed, if it existed at all, without authority or recognition of law.

By an act of February 5, 1879, the legislative assembly repealed the previous acts, attaching the county of Custer to the county of Gallatin for judicial purposes, and made provision for the holding of courts in the former. And by a joint resolution of the council and house of representatives of the previous date of January 18, 1879, after reciting that an organization of the county of Custer had been attempted and that doubts existed as to its legality, it was resolved that the acts of the county commissioners and other officers of said county were as valid as if the appointment of the county commissioners had been authorized by law. Laws of Montana, 100-117.

That resolution, if it had any effect on this case, had the effect to create a judgment where none existed before.

A legislature may undoubtedly, in many cases, pass

laws which will have a retroactive effect; but it will scarcely be contended that a legislature can by such a resolution so far affect the rights of parties and property as to validate a judgment which had been rendered without right or authority of law, and was, for all purposes of conferring any right upon a party claiming a benefit under it, utterly ineffectual and void.

The resolution of the legislative assembly, so far as it was an attempt to validate judgments like the one in question, is itself invalid, for the reason that if it were to be enforced, it would take away and infringe upon vested rights, and would have the effect to change rights to property without due process of law. *Shawnee v. Carter*, 2 Kan. 115; L. C. 4 U. S. Digest, 3, sec. 37; *Roulsorg v. Wolf*, 35 Mo. 174; *Dash v. Vankleek*, 7 Johns. 477; *Horton v. Horton*, Phill. (N. C.) L. 410; L. C. 12 U. S. Digest, 712, sec. 234.

*Second.* The second section of defendant's answer, in which it is alleged that at the time of the appeal from the judgment alleged to have been rendered in the probate court, there was no district court for Custer county, should not have been stricken out.

A reference to the statutes of Montana, before referred to, shows that it was not until several months afterwards that the first legislation was had authorizing the holding of a district court for Custer county. Not only was there no district court for that county authorized or recognized by law, but there had been no step taken to establish a district court in fact.

A bond conditioned to prosecute an appeal to a court which has not been established, either in law or in fact, is invalid, and a surety thereon is not estopped to deny the existence of any such court as the one to which the appeal is taken. *Tucker v. State*, 11 Md. 322; L. C. 1 U. S. Digest, 570, sec. 5908.

*Third.* The seventh section of the appellant's answer should have been allowed to stand. It alleges, in sub-

stance, that the verdict of the jury in the case of *Burton v. Young*, in the district court, was obtained by fraud and collusion on the part of the plaintiff in that case and certain of the jurors. If a verdict was obtained by undue influences, which were exerted upon the jury, neither Burton nor the plaintiff, to whom he assigned the judgment founded upon that verdict, should be permitted to enforce it against the defendant in this action. It cannot be urged that the person, if disqualified, might have been excluded at the time, for the appellant was not a party to that suit. If Burton obtained a judgment to which he was not entitled, as alleged in the part of the answer in question and which was stricken out, equity would not permit him or his assignee to enforce that judgment against the sureties upon the undertaking on appeal.

The matter struck out constituted a good equitable defense, and was brought forward by the defendant at the first opportunity afforded him.

It is well settled that a judgment obtained by fraud may be avoided, and that one who is prejudiced thereby, and who was not a party to the suit in which it was rendered, may attack it on that ground in a collateral action. 1 Story's Eq. Jur. sec. 2152; 2 Story's Eq. Jur. secs. 1571-1575; *Amitt v. Terry*, 35 N. Y. 256; *De Armond v. Adams*, 25 Ind. 455; *Callahan v. Griswold*, 9 Mo. 784; *Vandusin v. Mason*, 24 N. J. L. (4 Zab.) 818.

When a verdict is obtained against the principal upon an appeal bond, a surety, when an attempt is made to enforce the judgment against him, may defend on the ground that the verdict upon which the judgment was rendered was obtained by fraud and collusion. *Durand v. Mayo*, 25 Ga. 681; L. C. 1 U. S. Digest, 580, sec. 6092.

2. Under the facts numbered 2 and 3 in the appellant's requests for findings, and which were found by the court below as requested, the costs on the appeal in the case of *Burton v. Young*, from the probate to the district court,



should not have been allowed to the plaintiff in that action or included in the judgment rendered against the appellant in this. Code of Civil Proc. 160, sec. 443.

3. The court below should have found as requested in defendant's eighth request for findings. The only evidence upon that point was the testimony of A. Carmichael, the judge of the probate court. It shows that before the bringing of this action the plaintiff brought a suit in the probate court against the defendant, upon the undertaking set out in the complaint; that that action was brought to trial, and that during the trial the plaintiff dismissed the action. The code provides in what case an action may be dismissed. Code of Civil Proc. 96, sec. 234.

The evidence shows that the case was not dismissed as provided for in either of the subdivisions of that section. The defendant was there entitled to a judgment on the merits in that action. Code of Civil Proc. 96, sec. 235.

H. N. BLAKE, for respondent.

1. The court below found the facts and conclusions of law. No motion for a new trial was made, and it is not claimed by appellant that the judgment is inconsistent with the findings. Unless there was error in the action of the court below in striking out parts of the appellant's answer, the judgment must be affirmed. *Chumasero v. Vial*, 3 Mont. 376; *Largey v. Sedman*, id. 357.

The question of the validity of the acts of the officers of Custer county has been raised in the case of *Broadwater et al. v. Richards*, and I refer to the authorities and cases therein cited upon this point.

Laws declaring valid the acts of officers irregularly elected or appointed have been deemed constitutional, and this is the effect of the statutes of Montana concerning Custer county. The following are additional cases: *Sedgwick, St. and Con. Law*, 198 *et seq.*; *Davidson v. Johonnot*, 7 Met. 389; *Underwood v. Lilly*, 10 Serg. &

Rawle, 97-101; *Trustees, etc. v. McCaughy*, 22 Ohio, 152; *S. C. 2 Ohio St.* 152; *People v. Jenkins*, 17 Cal. 500.

3. The recitals in the undertaking on appeal recognized the validity of the probate court, and bound appellant. Recitals in a sealed instrument estop the party signing the same. Bigelow on Estoppel, ch. 10, "Recitals;" *Cutler v. Dickinson*, 8 Pick. 386; *Bruce v. United States*, 17 How. 437; *Shroyer v. Richmond*, 16 Ohio St. 455.

4. A motion for a new trial was made in *Burton v. Young*, and the grounds thereof should have contained the matter that was set forth in the answer which was struck out. The fraud complained of should have been made a ground under the clause relating to irregularity in the proceeding, or misconduct of the jury. This was not done, and therefore it was "waived," and cannot now be raised.

5. The matter that was struck out of the answer was no defense to the action.

WADE, C. J. This is an action upon an undertaking on appeal. It appears from the transcript that on the 28th day of September, 1878, judgment was rendered by the probate court of Custer county in favor of Thomas H. Burton against Elizabeth Young for the sum of \$369 and costs of suit, and on the 28th day of October, 1878, Young appealed to the district court of Custer county.

On this appeal the defendants Kelly and Hubbell entered into an undertaking whereby they undertook and promised to pay any judgment that might be rendered against the defendant Young in the district court. On the 27th day of May, 1879, the cause was tried in the district court, and a verdict and judgment thereon rendered against Young for the sum of \$302 and costs. The defendant did not file a motion for a new trial or appeal from this judgment. Thereafter the plaintiff Burton, in that action, sold and assigned all his interest in said judgment and undertaking to John McCormick, the

plaintiff herein, who brings this action on said undertaking.

To this action the defendants, the sureties upon the undertaking aforesaid, in their answer, set up several matters in defense, and among them the following: First. That on the 28th day of September, 1878, and thereafter until the 8th day of February, 1879, the county of Custer was an unorganized county in the territory of Montana, and that during said period of time such county had no lawfully authorized or qualified county officers, and that during such period the county of Custer had no probate judge or probate court, and no person authorized and qualified to act as such, and therefore that the judgment alleged to have been rendered by the probate court of Custer county is without force or effect and utterly void. Second. That there was not on the 28th of September, 1878, nor thereafter until the 8th day of February, 1879, any district court within and for the county of Custer. Third. That Young and her attorneys induced and procured these defendants to sign said undertaking by false and fraudulent representations. Fourth. That the judgment in the district court was not entered by the clerk or signed by the judge thereof on the 27th day of May, 1879, but that some time in August of that year the amounts, both of damages and costs, as they now appear in the judgment, were surreptitiously entered therein in a wrongful and unlawful manner, and that the name of the judge signed to said judgment was not signed or authorized by said court. Fifth. That the jurymen who tried the case in the district court were corruptly biased in favor of the plaintiff, in this, that they were creditors of the plaintiff, and that the plaintiff promised such jurymen, if a judgment were rendered in his favor, to pay such jurymen the amount of their claims against him; and sixth. That at the time said judgment was rendered in the district court against the said Elizabeth Young she was a married woman and the



wife of Richard Kelly, one of these defendants, and that Kelly was not made a party to said action.

Thereupon the plaintiff moved to strike out said several matters of defense, which motion was sustained, and this action of the court is assigned as error.

1. In this action the judgment of the probate court cannot be attacked. Sureties upon an appeal bond or undertaking cannot go behind the judgment to set up any matter of defense of their liability which might have been pleaded or shown in the original action. If the probate court was not properly constituted or authorized, or if the judgment was improperly rendered therein, the defendant in that action might have made that defense in the probate court, or had the same retried on her appeal to the district court. Having failed to do this, the sureties cannot now make this collateral attack upon the judgment.

There is another consideration which renders the question as to whether or not the probate court of Custer county, at the time of the rendition of the judgment therein, was properly constituted and authorized, an immaterial question. A cause of action reaching the district court from the probate court under section 435 of the code, is tried as a new action. The statute provides that such a case shall be tried in the district court *de novo*. New pleadings may be filed therein, and the action proceeds in all respects as if it had been commenced in that court. When the transcript and papers are sent from the probate court to the district court, and the parties appear therein without objection, the jurisdiction of the district court at once attaches, and the case is tried anew, and is not in any manner affected or controlled by the trial or judgment in the probate court. The defendant Young appeals. She causes the case to be taken to the district court. When it reaches there, the machinery of that court is set in motion and the action had to be disposed of like any other action. A trial ensues. A verdict is rendered

against her, followed by a judgment thereon. This judgment, being the result of a trial *de novo*, is not affected by any defect or infirmity that might pertain or belong to the judgment in the probate court. This judgment in the district court the sureties in the undertaking promised to pay or cause to be paid. They cannot go behind this judgment and set up any matter in defense that might have been pleaded in the original action. A defense that might have been made to that action cannot be pleaded for the first time in an action upon the undertaking.

In an action upon an undertaking on appeal from a judgment of the probate court to the district court, where a trial *de novo* has been had, and a new judgment rendered in the district court, an allegation in the answer of the sureties, that the judgment appealed from is fraudulent and void, is not a defense to such action. *Knight v. Waters & Pratt*, 18 Iowa, 345.

2. The allegation in the answer, that at the date of the rendition of the judgment in the probate court of Custer county there was no district court therein, and consequently no court in which an appeal could have been taken, does not constitute a defense to this action. If it were true that no separate district court had been established within and for said county at that time, then the statute of January 4, 1872, which was a re-enactment of a former statute on the same subject, whereby the county of Big Horn (since named Custer) was attached to the county of Gallatin for judicial purposes, was then in force. The purpose of this statute was to give to the people of Custer county all the benefits of a district court. It extended the jurisdiction of the Gallatin county district court over that county. The district court of Gallatin county thereby became the district court of Custer county also. It gave to the people of Custer county the same right to appeal their cases from the probate court of their county to the district court, as the people of Gal-

latin county had to appeal from their probate court to their district court.

And so, whether the district court of Custer county, at the date of the rendition of the judgment in the probate court, had been established in that county, or whether such district court at that time remained at the county seat of Gallatin county, is immaterial. In either case the defendant in the judgment, at the date of its rendition, might have appealed to the court exercising district court jurisdiction for Custer county. And this is what the defendant did do in giving the proper notice and causing to be executed the undertaking sued on in this action.

3. The third defense, that Young and her attorney falsely represented that the undertaking these defendants were about to sign was conditioned for the payment of the costs only in case judgment was rendered against Young in the district court, is wholly insufficient. The undertaking with all its conditions was before the defendants. They had it in their hands and an opportunity to examine it. If, by their own neglect or carelessness, they failed to do so, it is their own fault. If they were ignorant of the law on the subject, that does not excuse them. Mere verbal representations of what a written contract contains, when the same is in the hands of the party to be bound, if he signs it, do not affect the liability of such party.

4. The fourth and fifth defenses, which relate to the misconduct of the jury in the district court, and to irregularities in the entry and rendition of the judgment, are not available in this collateral attack upon the judgment. Such misconduct or irregularity did not render the judgment void. It was only voidable, and that by the application of the proper remedy. There was a verdict in favor of the plaintiff and against the defendant Young, and a judgment thereon. If the verdict was tainted with fraud; if the jury had been corrupted by the



plaintiff; or if the judgment was unlawfully and improperly entered, the remedy of the defendant was a motion for a new trial in the district court, where those things, if true, might have been made to appear. From an order granting or refusing such a motion an appeal lies to this court, and only by virtue of such an appeal can such or kindred questions be considered here.

5. The sixth defense, wherein it is alleged that the defendant Young, at the time of the rendition of the judgment against her, was a married woman, is not a good defense for these defendants. Such a judgment is not void. It is erroneous, but the error is cured if the party does not avail herself of her remedy, and at the proper time. In this case, the defendant Young might have made a motion to set aside the judgment because of her coverture, or she might have appealed from the judgment. She failed to do either. Having a statutory remedy which afforded full and complete relief, which she neglected to avail herself of at the proper time, she could not now, in an equitable proceeding, ask to have the judgment set aside (*Vantilberg v. Black*, 3 Mont. 459); and if not, the judgment against her must be held good as far as it concerns these defendants. If the judgment could not be set aside in a direct proceeding instituted by the married woman for that purpose, then, evidently, it could not be set aside in a collateral action by these defendants.

*The judgment is affirmed, with costs.*

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W. C. SOUTHMAYD, appellant, v. LEROY SOUTHMAYD, respondent.

**PLEADING — Immaterial variance.**— An appellate court will not sustain an objection to findings of a court below on the ground of variance between the proof and the pleadings, raised therein for the first time, and when it does not appear that the complaining party has actually been misled thereby.

When the record shows that testimony of possession was introduced on trial without objection, it will be presumed that the pleadings justified such testimony.

**MINING PARTNERSHIP — Possession — Part payment.** — When the findings of the court below show the existence of a mining partnership between appellant and respondent, under a verbal agreement that the latter shall control the interest of the former, receive all the proceeds thereof until the purchase price was fully paid, followed by both actual and constructive possession under the verbal agreement, though no money was paid down by appellant when he entered into possession and partnership, it is such a part performance of a verbal contract as to take it out of the statute of frauds, and specific performance will be enforced.

The facts found warrant an order for an accounting, and if the profits received amount to the price agreed to be paid, further specific performance may be enforced.

*Appeal from First District, Madison County.*

JAMES E. CALLAWAY and SANDERS & CULLEN, for appellants.

I. The court below found every issue of fact raised by the pleadings in favor of the appellant.

(a) That the defendant made a verbal contract with the plaintiff in March, A. D. 1870, immediately after the purchase orally, by said defendant, of a one-third interest in the mining ground described in the complaint, of one A. C. Hall, to sell the said one-third interest to plaintiff, and to convey the same to him whenever, and as soon as, the proceeds arising from the working of said ground should equal the sum of \$8,800; the said defendant to receive all the proceeds arising from said interest until said sum was paid.

(b) That in pursuance of such agreement plaintiff entered into possession of said interest, and plaintiff, defendant and one W. H. Hall worked and mined upon said ground during the years A. D. 1870 and A. D. 1871, as partners, books of account being kept and each partner receiving credit for the amount of labor done; that plaintiff further worked on said ground in the same ca-

capacity in the spring of 1872, and about a week in A. D. 1874.

(c) That defendant received all the proceeds from said ground from March, A. D. 1870, and has never accounted to defendant therefor.

These facts are sufficient for our present purpose. They show conclusively that, even if this were a case where a conveyance in writing were necessary under our statute of frauds, that there has been a performance, or at least a part performance, of this contract, and courts of equity intervene to relieve from the statute of frauds in such cases. *Browne on Statute of Frauds*, sec. 447; *Hoffman v. Fett*, 39 Cal. 109; *McCarger v. Rood*, 47 Cal. 141; 3 Washb. on Real Prop. p. 235; 1 Story's Eq. Jur. secs. 759-61; 2 Story's Eq. Jur. secs. 1522, 1522a; *Weber v. Marshall*, 19 Cal. 461; *Reese v. Roush*, 2 Mont. 591.

2. Our statute reserves to the court the right to relieve in such cases. *Codified Stats.* p. 393, secs. 7, 10.

II. The record discloses the fact that this contract was made before the government of the United States had parted with its title. The title, therefore, which defendant sold and plaintiff bought was a mere possessory one under local usages and customs of miners, and no conveyance in writing was necessary. It was held by possession merely, and when plaintiff went into possession, as he did as a partner with his brother, he had a perfect title to the same, incumbered merely by the agreement for the payment of the purchase price. *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 208.

III. But there is another view of this case which makes the inquiry as to whether there has been a part performance or not wholly immaterial. The court finds, and the facts show, that plaintiff and defendant were partners in this mining ground during the years A. D. 1870 and 1871, and perhaps, it may be said, inferentially, in 1872 and 1874. But this last is immaterial, as the partnership once shown to exist will be presumed to



continue until a dissolution is shown. If two or more persons acquire a mining claim for the purpose of working the same, and actually engage in working it, sharing the proceeds according to the interest of each in the ground, it is a partnership. *Duryea v. Burt*, 28 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490.

2. In partnerships, so far as partners and creditors are concerned, realty is treated as personalty, and governed by the doctrines applicable to personal property. Story on Partnership, sec. 93 *et passim*; Collyer on Partnerships, sec. 136 *et seq.*

SAMUEL WORD, for respondent.

This is an appeal from the judgment roll. No motion was made for a new trial in the court below. No statement of the evidence; and this court will not go outside of the pleadings and findings of the court, which constitute the transcript in this case.

The complaint sets up as a cause of action the purchase by the plaintiff, from A. C. Hall, by verbal agreement, of one undivided third interest in the property described in the complaint. See Complaint, Transcript, p. 2.

The findings of the court show that the verbal agreement made by plaintiff, concerning said interest, was made with the defendant, and not with A. C. Hall. See Findings, Transcript, pp. 50, 51.

The defendant is invited, by the plaintiff's complaint, to meet the averments of a contract by plaintiff with A. C. Hall, and the creation of a trust for his benefit in the hands of the defendant, by the sale and conveyance of the property by A. C. Hall to the defendant, while the findings show a verbal agreement between the plaintiff and defendant for which no consideration appears. 2 *Estee* (2d ed.), 306; *Hays v. Kershaw*, 1 Sandf. Ch. 258.

The findings must be supported by the averments of the complaint, or plaintiff cannot recover. He cannot aver one state of facts, prove another, and recover.

It appearing from the complaint, as also from the findings of the court, that the plaintiff at no time paid any of the purchase money for the interest bought of A. C. Hall, no resulting trust, or other trust by operation of law, was created. See 4 Kent Com. marg. secs. 305, 306; *Case v. Coddling*, 38 Cal. 193; 2 Story's Eq. sec. 1201; *Frederick v. Haas*, 5 Nev. 380.

Possession without payment of part of purchase money creates no resulting trust. See authorities above cited.

To take an agreement, not in writing, for the sale of lands out of the statute of frauds, a part performance of such agreement must not only be proven, but must be averred in the pleadings. In this case it is contended that the plaintiff's alleged possession was a part performance and takes the case out of the statute. Mere possession is not sufficient. Browne on Frauds, sec. 477. The possession must be under and in pursuance of the terms of the agreement. Browne on Frauds, secs. 454, 457, 476, 483; *Purcell v. Miner*, 4 Wallace, 517. And such possession must be retained in pursuance of said contract. Browne on Frauds, sec. 485. The findings of the court do not show that any possession of the plaintiff was under or in pursuance of the verbal agreement referred to. See Findings.

The possession referred to in the findings of the court is not inconsistent with a merely temporary and limited arrangement with defendant and W. H. Hall. The court does not find that he was a partner or joint owner in the real estate.

The verbal agreement must be clearly shown and the acts of part performance must be clear and unequivocal. Browne on Frauds, sec. 493; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Byrne v. Romaine*, 2 Edw. Ch. 445; 1 U. S. Eq. Dig. pp. 574, secs. 818, 820, 821, 837; 1 U. S. Eq. Dig. p. 576, sec. 872.

To reverse the judgment of the court below the appellant, evidently losing sight of the case made by the plead-

ings, relies upon a verbal agreement not sued on, and a part performance of the same by alleged possession of plaintiff. To sustain such an agreement, the part performance must be averred in the complaint and proven at trial.

The court does not find that he ever was in possession under said agreement. The complaint does not aver possession under any such agreement. And if the substance of such an agreement can be found in the second amended complaint, we find that the plaintiff, before the trial of the case in open court, and in writing, "*dismisses that part of his complaint which relates to the possession of the property therein described,*" leaving the complaint without any averment of plaintiff's possession at any time; and thus, so far as the averments of the complaint are concerned, divesting both plaintiff and defendant of any possession of the property at any time. See Transcript, p. 45.

In the court below we infer from the pleading that the case was tried upon the theory of a trust having been created in some way in the purchase by defendant from A. C. Hall. An express trust cannot be created or proven by parol. *Reese v. Roush*, 2 Mont. 591; *White v. Sheldon*, 4 Nev. 280.

The authorities heretofore cited show that the state of facts appearing from the pleadings or findings do not create a resulting trust.

The findings of the court, so far as any of them are upon material issues raised by the pleadings, are in favor of the defendant.

The verbal agreement relied on is without consideration and void under our statutes. See R. S. sec. 160, p. 577; id. sec. 176, p. 579; id. sec. 166, p. 578.

The findings show that the plaintiff has not paid the defendant any money, and is not entitled, in any view of the case, to a conveyance of the property or to any relief.

This is an action to recover mining claims. It is barred by limitation. R. S. p. 11, sec. 40.



Mining claims, patented or otherwise, must be conveyed by deed in writing as other real estate — a mere transfer of possession is not sufficient. 33 Cal. 318; *Carr v. Gollar*, 30 Cal. 484; *Felger v. Coward*, 35 Cal. 650; R. S. p. 577, sec. 160; *id.* p. 579, sec. 176; *id.* p. 578, sec. 166.

GALBRAITH, J. In view of our final conclusion in this case, the arguments presented by counsel require that we should consider:

1st. An objection urged by the respondent in relation to a variance in some particulars between the allegations of the petition and the findings of the court.

2d. An objection urged also by the respondent that the complaint does not contain an averment of possession of the subject of the controversy by the appellant, and will not, therefore, support a judgment.

3d. As to whether or not the conclusions of law, and the consequent judgment of the court, are warranted by the findings of fact.

The complaint alleges in substance the purchase of the interest in question by appellant from A. C. Hall, and that respondent became security for the performance of the terms of such purchase by appellant; and the conveyance of the interest to respondent by A. C. Hall, to indemnify him as such security, and to be held by him till the profits thereof had paid the purchase money, and when so paid he was to convey the same to appellant.

The answer denies these allegations, and alleges a purchase by respondent for himself alone from A. C. Hall; and also avers in substance that the respondent never did sell in any manner the interest in question to the appellant, nor is the appellant in any manner entitled to any interest therein, nor any part thereof, by virtue of any agreement of any kind with respondent. Whereas the findings show a verbal agreement by appellant to purchase the interest in controversy from respondent, after a verbal agreement by respondent to purchase the same of A. C. Hall.

It is claimed by the respondent for the first time, in this court, that in consequence of this different state of facts, as averred in the complaint, and as found by the court, that there is such a variance between the complaint and the findings as that the appellant cannot recover.

The transcript does not contain the testimony, therefore it does not show any objection to the introduction of evidence sustaining the findings of the court, upon the ground of such evidence not being warranted by the pleadings. Neither is there anything in the transcript from which the court can discover that injustice was done the respondent, or that he was misled to his prejudice by the introduction of such testimony. The findings of the court as above set forth, although not in accordance with the allegations of the complaint, show as a matter of fact that which is directly denied by the answer, viz., that appellant did agree verbally to purchase the interest from respondent. When nothing appears to show that the respondent was misled to his prejudice or surprise by the testimony and findings of the court, the denial in the answer would lead us rather to conclude that he was not thus surprised or misled. Section 110 of the Code of Civil Procedure provides that "no variance between the allegations in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. When it appears that a party has been so misled, the court may order the pleadings amended upon such terms as may be just."

Had the objection been made upon the ground of variance before the entry of judgment in the court below, this difficulty might have been obviated by amendment. In view of the statement of parties as set forth in the pleadings, and the history and circumstances of the case as shown by the transcript, we do not think that the respondent was misled to his prejudice, or surprised, by the introduction of the testimony or the findings of the

court therefrom. In the same view we are also of the opinion that the variance is not of sufficient importance to justify us in sustaining the objection, when for the first time raised in this court. *Dikeman v. Norrie*, 36 Cal. 94.

It is also objected by respondent that the complaint contained in the record does not make any averment of possession by appellant, for the reason that he dismissed "that part of his complaint which relates to the possession of the property therein described." The dismissal is in the following language: "Now come again the parties by their counsel as aforesaid, whereupon the said plaintiff dismisses that part of his complaint which relates to the possession of the property therein described."

It is not signed by the appellant or his counsel. It does not appear whether it was a verbal motion in open court and entered in the minutes, or in writing, as alleged in respondent's brief. It is indefinite and uncertain, both as to the party to whose possession it refers and what complaint is intended. The trial was had upon, and the transcript contains, the second amended complaint. The dismissal is immediately followed by a motion to strike out certain parts of the second amended complaint, which are specified, and which are inconsistent with the allegations therein of possession by the appellant. It is apparent that it was for this cause they were asked to be stricken out by the pleader. When the dismissal, therefore, is viewed in the light of the circumstances surrounding it, and construed in connection with the motion to strike out, which immediately succeeds, it should not be considered as dismissing that part of the second amended complaint which alleges the possession of the appellant. To further sustain the correctness of this view, we may remark that in order to warrant the findings testimony must have been introduced, and (so far as appears by the record) without objection, that appellant was in the actual possession of the interest in con-



troversy, and in the constructive possession thereof, by agent, as well as by being a partner and tenant in common.

In relation to the objection by respondent that the complaint does not contain an averment of possession under the agreement, we think that the complaint makes this allegation with sufficient clearness and precision.

The next subject of inquiry must then be as to whether or not the conclusions of law and the consequent judgment of the court are warranted by the findings of fact. The findings are in substance as follows: "That in March, 1870, the respondent, William H. Hall and Amos C. Hall were the owners and possessors, as tenants in common, and partners in the working of the mining ground, the one-third interest in which is in controversy, and all the rights and appurtenances thereto belonging. That at this time Amos C. Hall made a verbal agreement to sell to respondent his interest in said property, being an undivided one-third, for \$5,000, and then delivered to him the possession thereof. That in November, 1871, the respondent paid to A. C. Hall the above sum, and received from him a deed for the interest. That also in March, 1870, immediately after the making of the foregoing verbal agreement, the respondent made a verbal agreement to sell and convey to the appellant the above interest upon the payment by appellant to respondent of the sum of \$5,000, and the further sum of \$3,800, with interest on the last named sum at the rate of ten per cent. per annum, the same being due and owing by appellant to respondent at the date of this agreement. That the above property is the mining ground described in the second amended complaint. That respondent was to execute and deliver to appellant a deed for the interest as soon as respondent should receive from the profits in the mining of said interest the above sum of money, no time being fixed for said payment. That appellant never paid to respondent any

money on account of this agreement. That respondent further agreed to control and manage two-thirds of the said property and receive all the proceeds thereof. That in 1870 and 1871 the appellant, respondent and Wm. H. Hall worked upon said property as equal partners. That the time book was kept by Wm. H. Hall, who credited therein each partner with the wages for the number of days in which he performed labor. That in November, 1871, the respondent also became the owner and possessor of the interest of Wm. H. Hall in the property, the same being an undivided one-third thereof. That respondent has received all the proceeds of the one-third interest in controversy since March, 1870, and never accounted to appellant therefor. That appellant also worked upon said property in the spring of 1872, and about a week in June, 1874, but has done no labor thereon since the last date, excepting certain times when he was interested in the contracts of third persons, and obtained the consent of respondent so to do. That appellant was sick and absent from the territory from September, 1873, until about June, 1, 1874, and from September, 1874, until September, 1876. That appellant demanded his said interest in the property from respondent in March, 1877."

It is claimed that these findings do not establish a resulting trust or other trust by act or operation of law. In order to create such a trust, payment at the time is indispensable. 4 Kent's Com. marg. p. 305.

The court finds that the appellant never paid any money on account of his agreement with respondent, but the respondent was to be paid out of the profits of the interest in question as soon as appellant should receive therefrom sums sufficient to pay the purchase money thereof. Neither is there any finding from which can be discovered the amount of the profits of said interest, and consequently how much, if any, should be applied to the payment of the purchase money to be paid under the

appellant's agreement with respondent, even if payment at the time was not essential to the creation of a trust by implication of law. But if there was such finding, nevertheless payment of the purchase money, or any part thereof, subsequent to the verbal agreement between the parties, could not establish a resulting trust of the interest in question, either in whole or in part. *Frederick v. Haas*, 5 Nev. 389; *Case v. Coddington*, 38 Cal. 191.

In brief, the findings do not establish what in law constitutes the requisite elements of a resulting trust. The findings of the court, however, show that the appellant, respondent and Wm. H. Hall worked upon the property in 1870 and 1871 as equal partners. It is also found that a time book was kept by said Hall, who credited therein each partner for the number of days in which he worked. They also show that appellant bought into a partnership already existing, by purchasing the interest in question from respondent, who belonged to this partnership, who in turn had purchased the same from A. C. Hall, who was also a member of the partnership. In reference to this partnership the court also finds that its members, who were then the respondent, Wm. H. Hall and Amos C. Hall, "were the owners and possessors, as tenants in common and partners in the working of the mining ground and all the rights and appurtenances thereto belonging." It also appears from the findings that in November, 1871, the respondent obtained the interest of Wm. H. Hall in the property, which was an undivided one-third. The above facts establish the existence of a partnership.

- The court below does not find the exact terms of this partnership, but it does find that before the respondent obtained the interest of Wm. H. Hall, that appellant, respondent and Wm. H. Hall worked upon the property as equal partners, which is equivalent to a statement that they were partners, each having an equal interest in the partnership.



The inference must therefore be, that subsequent to this period the respondent had an interest of two-thirds and the appellant that of one-third in the partnership. It may also be fairly inferred that the object of the partnership existing between appellant and respondent was the working of the property for mining purposes, as it had been before, and that they continued to be partners in proportion to their respective interests and subject to the other incidents and consequences resulting from such a partnership.

"It is not necessary that there should be an express stipulation between the partners to share the profits and losses, as that is an incident to the prosecution of their joint business." *Duryea v. Burt*, 28 Cal. 569, and cases there cited.

The findings show that the property upon which the partnership was employed is that described in the second amended complaint, and it is therein set forth as "certain gulch claims and placer mines and the flumes thereon, and water rights, and water-ditches and privileges thereunto belonging; also the dump ground therefor and appurtenances thereto belonging."

It would appear from this general description that the property was strictly mining property, and only valuable for mining purposes. We think that the foregoing facts indicate conclusively that there existed between the appellant and respondent what is termed a mining partnership; "a species of partnership containing some of the incidents of trading partnerships, and some of the incidents of tenancy in common." *Settembre v. Putnam*, 30 Cal. 490.

The findings do not show that there was ever a dissolution of this partnership. A rule, peculiar to mining partnerships, is that each owner may sell and convey his interest at any time, and such sale does not, as in the case of ordinary trading partnerships, dissolve the partnership. This distinction is founded upon the grounds

both of expediency, because mining partnerships would suffer great inconveniences from the application of the common rule, and also that such partnerships are not founded upon the "*delectus personæ*," which is the case with ordinary commercial partnerships. The sales of the interests as shown by the findings did not, therefore, dissolve the partnership, and it must therefore be presumed as still continuing to exist. *Skillman v. Lachman*, 23 Cal. 199; *Duryea v. Burt*, 28 Cal. 569.

As partner, the appellant was therefore also tenant in common. It is well settled that the possession of one tenant in common is the possession of all. *Waring v. Crow*, 11 Cal. 367. Possession and seizin of one tenant in common is the possession of the other. Smith on Real and Personal Estate, p. \*392. The findings also show that in March, 1870, the respondent agreed to control and manage two-thirds of the property and receive the proceeds thereof. At this time Wm. H. Hall owned one-third interest in the property, and also worked with the parties to the action thereon. We must therefore conclude that the two-thirds which the respondent agreed to control and manage were those of himself and the interest in controversy. As the findings also show that respondent did receive the proceeds thereof, we must likewise infer that he did in fact control and manage the above interest. Therefore, as controller and manager, he would have been in possession thereof for appellant. As the findings also show that appellant worked upon said property in 1870 and 1871, and a time book was kept by Wm. H. Hall, who entered therein the wages for each day in which each partner worked, and that appellant also worked thereon for a short period in 1872 and 1874, we must conclude that during these periods he was in the actual possession of the interest in controversy. The fact that appellant, when interested in the contracts of third persons, obtained the consent of respondent at

certain times to work on the property, is not inconsistent with his possession.

The appellant has, therefore, during the above periods, been in the actual possession of the interest in controversy, and, both by his agent and as tenant in common, has, ever since the verbal agreement with respondent, been in the constructive possession thereof. The findings leave no doubt but that he was thus in possession under and by virtue of the verbal agreement. The statute of limitation in relation to mining claims has, therefore, no application to this case. In view of the time spent and work done by the appellant upon the property, and also the mutual trust and confidence which is presumed from the partnership relation, we are of the opinion that the refusal of the respondent to convey to him the interest in controversy, when the profits thereof have amounted to the sum agreed upon, would work a fraud upon appellant. We therefore conclude that the actual and constructive possession of appellant, coupled with the manifest fraud which the admission to the possession would cause to him unless the respondent would comply with his agreement, is such a part performance of the verbal agreement as that its specific performance, when the profits amount to the sum thereby agreed upon, should be enforced. Story's Eq. Juris. secs. 759-761.

Whether or not a specific performance shall be decreed cannot, of course, now be determined, until it is ascertained what, if any, have been the profits of the interest in question. The findings, as we have seen, show that the respondent agreed to control and manage this interest and receive the proceeds thereof; that he has received all the proceeds of the interest since March, 1870, and never accounted to appellant therefor; that appellant and respondent are now the only members of the partnership, and that appellant demanded his interest in 1877.

Under the above state of facts, the appellant is entitled



to an order for an accounting, as prayed for in his amended complaint.

Judgment is reversed, with costs, and cause remanded for further proceedings in accordance with this opinion.

*Judgment reversed.*

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COMMISSIONERS OF MISSOULA COUNTY, respondents, v.  
W. J. McCORMICK ET AL., appellants.

BOND OF COUNTY TREASURER — *How approved.*—The approval of the bond of the county treasurer, as provided by art. VI, sec. 87, of the Codified Statutes, must be by the full board, or it must be made to appear affirmatively that its approval otherwise was a case within the exception provided by statute.

NOT RETROSPECTIVE.—An official bond will not be held to be retrospective unless expressly so stated, and sureties thereon will not be held responsible thereon for default made before signature.

CHECKS NOT MONEY.—A board of county commissioners has no right or authority, in their settlement with treasurer, as provided by statute, to accept and count as money the checks of third parties.

*Case of Missoula County v. Edwards*, 3 Mont. 60, reaffirmed.

*Appeal from Second District, Missoula County.*

E. W. & J. K. TOOLE, for appellants.

This was an action brought by the respondents upon the official bond of W. G. Edwards, late treasurer of Missoula county. A demurrer was interposed by the defendants in the court below, and overruled. This we think was error.

It will be assumed that the "board of county commissioners" is not a natural person. If it is a corporation, it must allege how it was created; a failure to do this omits one of the elements of a good cause of action. The want of capacity to sue is available on a general demurrer. *Carhart v. Montana M. L. & M. Co.* 1 Mont. 245.

2. The answer of the appellants denies the allegations

of the complaint as to the time when the alleged default of the treasurer occurred, and sets up affirmative matter showing that the default of said treasurer occurred long prior to the execution and delivery of the bond sued on. This is charged in plain, concise and unambiguous terms.

3. The answer shows that prior to the execution and delivery of the bond sued on, the board of county commissioners had examined the books, papers, etc., of said treasurer, reported the same correct, when in truth and in fact the said treasurer was then in default, and had fraudulently appropriated the sum of \$1,600 to his own use. That said board thereby represented the management of said officer to have been prudent and honest, and that the defendants relied upon said report and representations and were thereby induced to become sureties upon said bond; and that the board of county commissioners knew that their report was false.

Upon the second proposition, that the bond sued on does not cover past deficiencies and defaults, unless the law expressly authorizes it and it is inserted in the bond, we cite the following authorities: *Myers v. United States*, 1 McLean, 493; *United States v. Spencer*, 2 McLean, 405; *Farrar v. United States*, 5 Pet. 373; *United States v. Linn et al.* 1 How. (U. S.) 104; *Postmaster-General v. Nowell*, 1 Gilp. 106; *The County of Mehaska v. Ingalls*, 16 Iowa (Withrow), 81; *Bessinger v. Dickinson*, 20 Iowa (Withrow), 261; *Vivian v. Otis*, 24 Wis. 518 (1 Am. Dec. 199); *County of Fontenac v. Breden*, 17 Grant Ch. 645.

If the money converted by the treasurer remained in his hands at the time of the execution of the new bond, we do not deny the liability of the sureties of the new bond under the authorities just cited; but this fact must be made to appear before such liability attaches. And if the complaint averred it, the answer denies it. *United States v. Linn*, 1 How. (U. S.) 104; *United States v. Boyd*, 15 Pet. 187.

The answer alleges that the default occurred prior to

the execution of the bond sued on, and the same was not denied. Judgment should have been for defendants.

Upon the third proposition, that the bond sued on was obtained by the fraudulent and false report of the board of county commissioners, we submit the following:

1st. The board of county commissioners acted within the scope of their authority when they examined the papers, books, moneys, etc., of the county treasurer, and made their report on the same. R. S. Mont. p. 554, sec. 84; id. p. 556, sec. 88.

The securities had a right to look to the provisions of this statute and to calculate their liability, on the presumption that the duties enjoined on the treasurer had been up to that time faithfully and prudently discharged. The plaintiff is therefore chargeable with the consequences of its own neglect or breach of duty. *The People v. Jansen*, 7 Johns. 339.

It is a well settled principle of law that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills and other valuables are intrusted, have the right to be treated with perfect good faith. If the obligees are aware of secret facts materially affecting or increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them. Morse on Banks, p. 226.

Again: Where any act has been done by the obligees that may injure the surety, the court is very glad to lay hold of it in favor of the surety. *Law v. East India Co.* 4 Ves. 824; Brandt on Guaranty and Suretyship, sec. 79.

• Under the averments of this answer three of the defenses set up are: That the board of county commissioners had examined the account of this treasurer (an act authorized by law), and found it correct, and so published to the world a report of the same (as required by law); that said commissioners knew that the same was false, but that the sureties, relying upon this statement, as they had a right to do, executed the bond sued on; that they



would never have executed the same if it had not been for such representations. This was a perfect defense if proven.

Wherever there is any *misrepresentation* or *concealment* from the surety of any material fact, which, had he been aware of, he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liability. See note to *Reese v. Barrington*, 2 Lead. Cases in Equity, 707.

Mr. Justice Story takes even broader grounds than this. 1 Story's Eq. Jur. sec. 215. The learned judge cites the case of a party who, knowing himself to have been cheated by his clerk, concealed the fact, applied for security in such a manner and under such circumstances as held out the clerk as one whom he considered as a trustworthy person, and thereby induced another to become his surety. The contract of suretyship thus obtained was held to be void; the silence, under such circumstances, being treated as expressive of a trust and confidence held out to the public equivalent to an affirmation.

But here is a case where the actual affirmation of honesty and trustworthiness is made, and made as in this case, as shown by the averments, when it was known to be false. The effect of this was to inspire the public with confidence in the treasurer; to disarm suspicion and to prevent inquiry. The loss occasioned by the fraudulent appropriations of Edwards, their treasurer, of the moneys, must fall upon either the county or his sureties. The latter are free from blame; they acted in the matter with reasonable prudence and discretion. They relied upon the truth of representations made by those having the right to speak for the county. These representations are alleged to be false, and the allegations held immaterial by the court below. See *Graves v. The Lebanon National Bank*, 10 Bush (Ky.), 23 *et seq.* These principles are alike applicable to public officers. *People v. Jansen*, 7 Johns. *supra*, 339.

But where is any allegation that the board of county

commissioners are public officers? or that Missoula county is a corporation? The board of county commissioners is the tribunal or body that made the representations, and the board of county commissioners is the obligee in the bond. If Missoula county was shown to be an organized county, then the court *might* take judicial notice that it was a body corporate and politic. *Not otherwise.* R. S. Mont. p. 173, sec. 25; *id.* sec. 335, p. 642.

By sec. 337, Revised Statutes of Montana, it is provided that the powers of a county as a body corporate and politic shall be exercised by a board of county commissioners therefor. It will be observed that the complaint in this case does not show that there ever was a board of county commissioners of Missoula county elected, qualified or appointed, or who, if any one, composed it.

4. The judgment in this case was erroneous, and ought to be reversed for another reason, to wit: The sureties in this bond obligated themselves respectively in the following sums:

W. J. McCormick in the sum of.....	\$2,000
W. E. Bass in the sum of.....	2,000
J. M. Minesinger in the sum of .....	2,000
J. M. Bunnley in the sum of.....	2,000
Robt. Linder in the sum of .....	1,000
John Rankin in the sum of .....	1,000
Patrick McGrath in the sum of .....	2,000
Making in the aggregate .....	<hr/> \$12,000

The judgment rendered is against all the defendants for \$3,442.94 and ten per cent. interest. This authorizes an execution against the property of any one of the defendants for that amount; is in violation of their obligation, and not supported by the pleadings. See Transcript, p. 80.

We submit that the answer of appellants was a good one—a square denial of the material allegations of the

complaint. Supplemented by affirmative allegations, entitled them to a trial upon the merits, and that no answer is ever considered frivolous, entitling a party to a judgment on the pleadings, where a *bona fide* defense is sought to be pleaded. If, in this case, the court was of opinion that the defense was improperly pleaded, it should have permitted the party to amend. But it seems that the court treated the matter as properly pleaded, but no defense.

A. E. MAYHEW, District Attorney, for respondent. No brief filed.

CONGER, J. For a cause of action the complaint in this case alleges that on the 4th day of August, 1873, the defendant, W. G. Edwards, was duly elected to the office of county treasurer of Missoula county, and afterwards, on the 2d day of March, 1874, presented his official bond as such treasurer to the board of county commissioners, which said bond was duly approved and recorded according to law. That on the 12th day of July, 1875, the defendant Edwards, as such treasurer, presented another and a different bond to the chairman of the said board of county commissioners, which bond was by him and the clerk of said board, on the same day, duly approved, filed and entered of record.

The following extract from the new bond explains clearly its object: "And whereas the said William G. Edwards is desirous of releasing certain persons who became his sureties on his official bond, and in order to effect that purpose, he now purposes executing this his new official bond as treasurer of said Missoula county."

This bond further provides, among other things, "that the said William G. Edwards and his deputies shall pay, according to law, all moneys which may come into his hands as treasurer."

The complaint further alleges that, after the 12th day



of July, 1875, and after the receiving, accepting and approval of said second official bond by the board of county commissioners, and between the 12th day of July, 1875, and the 6th day of March, 1876, the said Edwards, as such treasurer, received various sums of money, amounting to about the sum of \$20,000, the same being part of the taxes and licenses received in the county of Missoula for the years 1875 and 1876.

And further, it is alleged that after the filing and approval of the said second official bond, and during the years 1875 and 1876, the said Edwards, as treasurer, did, fraudulently and in breach of his official trust, convert and appropriate to his own individual use and purposes the sum of \$2,475 of said moneys so collected by him, the same being a portion of the money belonging to the said county of Missoula, and which said sum of money said Edwards, as such treasurer, has failed to pay over to his successor in office, Edwards' term of office having expired on the 5th day of March, 1876.

It is shown by the record in the cause that, on the 9th day of March, 1876, the sureties on the bond of Edwards were duly notified of the default of their principal, and a demand was made upon them to make good to the county the amount of the deficiency in his accounts. The sureties, who are defendants in this action, failed and refused to comply with such demand. Whereupon this action was brought to recover upon the bond the said sum of \$2,475.

A demurrer was interposed, which was overruled by the court, and on the 13th day of November, 1879, the defendants appeared in the action and filed their answer to the plaintiff's complaint, and "Admit that they executed the bond now in suit, but that it was executed at the time and in the manner and under the circumstances in this answer set forth. Deny that the said W. G. Edwards, or any other person, ever presented the bond in suit to the board of county commissioners of Missoula county, Montana territory, for their approval or accept-

ance, on the 12th day of July, 1875, or at any other time prior to the 7th day of September, 1875. Deny that the bond in suit was received, approved or accepted as the official bond of W. G. Edwards or otherwise by the board of county commissioners of said Missoula county on the 12th day of July, 1875, or at any other time prior to the 7th day of September, 1875. Deny that on the said 12th day of July, 1875, or at any other time prior to the 7th day of September, 1875, the said bond now in suit was received, approved or acted upon, or treated, whether duly or otherwise, by the said board of county commissioners of Missoula county, as the official bond of W. G. Edwards, treasurer, whether in place of the first bond of the said W. G. Edwards, treasurer, or otherwise. Deny that after the acceptance or approval of the bond in suit by the board of county commissioners of said Missoula county, whether between the 12th day of July, 1875, or the 6th day of March, 1876, or during any other time whatever, after the acceptance or approval of the bond in suit by said board of county commissioners, that said W. G. Edwards, as treasurer of said county, collected or received into his hands the sum of \$20,000 belonging to said county of Missoula, whether for taxes, licenses or from any other source, or that he collected or received into his hands at all, after the acceptance or approval of said bond as aforesaid, any sum or sums of money whatever belonging to said county of Missoula greater than the sum of \$17,600, whether as treasurer or otherwise, whether from taxes, licenses or from any other source. Deny that said W. G. Edwards, treasurer as aforesaid, did, during the years 1875 and 1876, or either of said years, or at any other time after the acceptance or approval of said second bond, the one now in suit, whether fraudulently and in breach of his trust as such treasurer, or otherwise, convert or appropriate to his own use or benefit the sum of \$2,475 of said county money collected by him as treasurer as aforesaid, or that he converted or appropriated to his own use or benefit

any sum whatever of said county money greater than the sum of \$484. Deny that, after the acceptance or approval of the bond now in suit, the said W. G. Edwards, treasurer as aforesaid, converted or appropriated to his own use, or for any other purpose, any sum or sums of money belonging to said county of Missoula, or collected by him as treasurer, greater than the sum of \$484. Deny that there is now due or unpaid from these defendants to plaintiff the sum of \$2,475, or any other sum whatever.

“For a further answer and second defense, defendants aver that, prior to the execution of the bond in suit, the said defendant, W. G. Edwards, had been elected treasurer of Missoula county, Montana territory, and as such treasurer had filed his official bond, which had been properly approved in the manner prescribed by law; that after the filing and approval of said official bond, and prior to the execution of the bond in suit, two of the sureties on said official bond gave notice and applied to be released from said bond. That in consequence of the withdrawal of said sureties from such official bond, it became necessary for the said W. G. Edwards, as such county treasurer as aforesaid, to file a new and second bond. That in order to execute and file said new official bond, the one now in suit, the said W. G. Edwards applied to the defendants to sign and execute the said bond with him, and to become his sureties thereon. That in order to induce these defendants to sign said bond and become his sureties thereon, the said W. G. Edwards stated and represented to these defendants that there was no danger to be incurred in so doing; that he was not indebted or in default to said county of Missoula; that he had in his hands all of the moneys belonging to said county, and all other moneys for which he was responsible as such county treasurer, and that the same were being safely kept. That the defendants, relying on the truth of these representations, made to them



by the said W. G. Edwards, treasurer as aforesaid, and believing them to be true, were induced thereby to sign the bond now in suit, and to become the sureties of the said W. G. Edwards thereon. Defendants further aver that all of the aforesaid representations made to them by the said W. G. Edwards, treasurer as aforesaid, were false, and were known to him to be false at the time he made them; that the said representations were artfully and fraudulently made by the said W. G. Edwards, for the purpose of deceiving the defendants, and to induce them to execute the bond in suit, as his sureties thereon; that the defendants were deceived thereby, and by said fraud and deception were induced to sign the bond in suit. Defendants aver that they are informed and believe that at the time the said W. G. Edwards, treasurer as aforesaid, made the representations aforesaid to these defendants, and for more than three months prior thereto, he, the said treasurer, was in default for moneys belonging to said county of Missoula, and intrusted to his keeping and custody as such county treasurer; and that prior to the time he made the representations to these defendants as aforesaid, he, the said W. G. Edwards, county treasurer as aforesaid, had fraudulently appropriated to his own use and benefit large sums of money belonging to said county of Missoula, and which had been placed in his care and custody as such county treasurer; and that at the time the bond in suit was signed by them, these defendants, said sums of money appropriated by said treasurer as aforesaid had not been repaid or replaced. Defendants further aver that at the time they signed the bond in suit, it was understood and expected by them that before said bond would be accepted or approved by the said board of county commissioners of said Missoula county, that the said board of county commissioners would fully examine all books, papers and money in the custody of, or under the control of, the said W. G. Edwards as such county treasurer, and see if they were cor-

rect, and in case they were not so found correct, the bond in suit would not be approved or accepted. Defendants further aver that the bond now in suit was presented to the said board of county commissioners on the 7th day of September, 1875; and at that time, and prior to the acceptance and approval of said bond by said board of county commissioners, the said board of county commissioners proceeded to examine, and did examine, the books, papers and moneys of the said W. G. Edwards, as such county treasurer, and after such examination represented, and caused to be entered in the minutes of their proceedings, an order or entry to the effect that they had examined the books and accounts of said treasurer and the moneys reported to be in the hands of said treasurer and belonging to said Missoula county, and that they had found the same to be correct and properly accounted for. That the report of the board of county commissioners, made as aforesaid, was such as to induce the public to believe that the said treasurer had prudently and honestly administered the duties of his office, and that he was honest and trustworthy. That the defendants, believing the report of the board of county commissioners to be true, and relying on the truth of the same, consented and permitted the bond in suit to be presented for acceptance and approval, and that the same was then and there accepted and approved as the official bond of the said W. G. Edwards as county treasurer.

“Defendants aver on information and belief that at the time of the examination of the books, papers and moneys as aforesaid, and at the time of the acceptance of and approval of the bond now in suit, the said county treasurer had appropriated and converted to his own use and benefit a large sum of county money belonging to said Missoula county, and intrusted to the care and custody of the county treasurer; that said sum appropriated and converted to his own use by said county treasurer, W. G. Edwards, was about the sum of \$1,600, and that

at the time that the bond in suit was accepted and approved, said sum had not been repaid, or any part thereof, but that the said treasurer was then in default to said county for said amount. Defendants further aver that they are informed and believe that at the time of the examination of the books, accounts and moneys of the said county treasurer, W. G. Edwards, as aforesaid, and at the time the same was reported to be correct by the said board of county commissioners, the said board of county commissioners knew that the report was not correct, and that the said treasurer, W. G. Edwards, was a defaulter, and did not produce for examination or properly account for the sum of money belonging to Missoula county, and which his books showed should be in his hands as such county treasurer. That the said treasurer, W. G. Edwards, at that time presented to the board of county commissioners, as a portion of the county funds for which he was accountable as such treasurer, a check on the Missoula National Bank, drawn in favor of the said W. G. Edwards, by one D. J. Welch. That said board of county commissioners did not examine said check as to its being genuine, or make any effort to find out if said check would be paid on presentation at said bank, but received the same and counted it as a portion of the county funds reported by said county treasurer as being in his hands as aforesaid. Defendants aver that said check was not money or a portion of the county funds for which said county treasurer, W. G. Edwards, was responsible as such county treasurer, and that the fact was known to the said board of county commissioners at the time they made and entered their report aforesaid, and that it showed upon the face of the transaction that the said Edwards was in default to the county of Missoula, for county funds unlawfully appropriated and used by him, and remaining unpaid at the time the bond in suit was accepted and approved by the said board of county commissioners."



Whereupon the district attorney moved the court for judgment on the pleadings, for the reasons:

1st. "That the denials in defendants' answer to the complaint herein are evasive and immaterial; and

2d. "That the new matters set up as a defense are redundant, irrelevant, sham, immaterial and frivolous, and constitute no defense."

This motion coming on to be heard was sustained by the court, and judgment ordered to be entered in said cause in favor of the plaintiff and against said defendants for the sum of \$3,442.94, and costs of suit.

To this order, and judgment of the court entered in compliance therewith, the defendants at the time duly excepted, and have removed the cause to this court for review on appeal.

The answer of defendants admits the execution and delivery of the bond, and alleges that defendants were induced to become sureties thereon by reason of the false and fraudulent representations of the treasurer, Edwards, concerning the condition of his accounts at the time as treasurer of Missoula county. Certain irregular proceedings and false reports of the board of county commissioners of said county, touching the condition of the official accounts and business of said treasurer as ascertained by them at a regular meeting of said "board" held September 7, 1875, are also alleged and set forth in the answer. Denials of certain allegations of the complaint are made, which denials constitute a good defense to the action only until such allegations are shown to be material as matters of fact, and are sustained by competent proof. Defendants deny that the bond was submitted to the board of county commissioners for approval July 12, 1875, but admit that it was so submitted September 7, 1875. Deny that the new bond was accepted, approved or acted upon by the commissioners either as a substitute or otherwise of the original bond, prior to September 7, 1875.

The complaint charges that the alleged defalcation of Edwards, treasurer, occurred between the 12th day of July and the 5th day of March, at which period his right to hold and enjoy the office of treasurer terminated by limitation of law. It becomes an important question in this inquiry as to the period at or near which the defalcation complained of actually occurred. This leads us to consider the subject with reference to the interval between the 12th day of July and the 7th day of September, 1875, as the time when the unlawful conversion of the moneys of Missoula county, mentioned in the complaint and answer, is believed to have been made.

The indorsements on the instrument show that the bond in suit was approved and filed, and duly recorded on the 12th day of July, 1875. It appears from such indorsements that the approval of this bond was made by the chairman and clerk only, without the official concurrence of the entire board of commissioners.

Section 87, article VI, Codified Statutes, page 451, reads as follows: "A county treasurer shall be elected in each county for the term of two years, and shall, before entering upon the discharge of his duties, execute to the board of county commissioners of his county a bond, with three or more sufficient sureties, to be approved by the board, and in such penal sum as they may direct, which bond, with the approval of the board indorsed thereon by their clerk, shall be filed in the office of the county clerk; and in case the board of commissioners shall not be in session in time for any county treasurer to present his bond for their approval as above specified, or he shall be unable from any cause to present his bond at any regular meeting of the board after due notice of his election, then it may be lawful for such treasurer to present his bond to the chairman and clerk of such board for their approval, and their approval indorsed thereon shall have the same effect as if done by the board of commissioners. And in such case, when the board shall not have fixed the

penal sum of such bond, it shall not be less than double the amount of all the moneys directed by the board to be levied in the county and to be paid to the treasurer during the year."

In view of this provision of the statute, can it be seriously contended that the approval of the bond under consideration, in manner and form as shown by the indorsements thereon, was effectual and valid, and consistent with the requirements of the provisions of law above quoted? We think not. We are clearly of the opinion that, by no just interpretation or construction of the statute regulating this duty, can it safely be assumed that the power to approve the bond is conferred upon the chairman of the board or its clerk. That whatever right or duty is imposed by law upon the board of commissioners to accept and approve an instrument like the one in question, for the purpose of substituting the same in lieu of a former one executed, of the same nature and character, that right or power is vested in the board alone as a whole, to be exercised only by that body when convened in regular session. This power, therefore, being inherent in the board alone, cannot be legally delegated to others.

A portion of defendants' answer may be considered in this connection. We quote: "Defendants further aver that the bond now in suit was presented to the said board of county commissioners on the 7th day of September, 1875, and at that time, and prior to the acceptance and approval of said bond by said board of county commissioners, the said board of county commissioners proceeded to examine, and did examine, the books, papers and moneys of the said W. G. Edwards, as such county treasurer, and after such examination reported and caused to be entered in the minutes of their proceedings an order or entry to the effect that they had examined the books and accounts of said treasurer, and the moneys reported to be in the hands of said treasurer and



belonging to said Missoula county, and that they had found the same to be correct and properly accounted for. That the defendants, believing the report of the board of county commissioners to be true, and relying upon the truth of the same, consented and permitted the bond in suit to be presented for acceptance and approval, and that the same was then and there accepted and approved as the official bond of the said W. G. Edwards as county treasurer."

If this be true, then the action of the commissioners was conclusive as to the time when the bond in question was accepted and approved by them and substituted in lieu of the original bond of said treasurer. It fixes and determines the date at which the liability of the defendants, as sureties, began.

Defendants in their answer aver, "on information and belief, that at the time of the examination of the books, papers and moneys as aforesaid, and at the time of the acceptance of and approval of the bond now in suit, the said county treasurer had appropriated and converted to his own use and benefit a large sum of county money belonging to said Missoula county, and intrusted to the care and custody of the said county treasurer. That said sum appropriated and converted to his own use by said county treasurer, W. G. Edwards, was about the sum of \$1,600, and that at the time that the bond in suit was accepted and approved, said sum had not been repaid, or any part thereof, but that said treasurer was then in default to said county for said amount. Defendants further aver that they are informed and believe that at the time of the examination of the books, accounts and moneys of the said county treasurer, W. G. Edwards, as aforesaid, and at the time the same was reported to be correct by the said board of county commissioners, the said board of county commissioners knew that the report was not correct and that the said treasurer, W. G. Edwards, was a defaulter, and did not produce for examina-

tion or properly account for the sum of money belonging to Missoula county, and which his books showed should be in his hands as such county treasurer. That the said treasurer, W. G. Edwards, at that time presented to the board of county commissioners, as a portion of the county funds for which he was accountable as such treasurer, a check on the 'Missoula National Bank,' drawn in favor of the said W. G. Edwards, by one D. J. Welch. That said board of county commissioners did not examine said check as to its being genuine, or make any effort to find out if said check would be paid on presentation at said bank, but received the same and counted it as a portion of the county funds reported by said county treasurer as being in his hands as aforesaid. Defendants aver that said check was not money, or a portion of the county funds for which said county treasurer, W. G. Edwards, was responsible as such county treasurer, and that the fact was known to the said board of county commissioners at the time they made and entered their report aforesaid; and that it showed upon the face of the transaction that the said Edwards was in default to the county of Missoula for county funds unlawfully appropriated and used by him and remaining unpaid at the time the bond in suit was accepted and approved by the said board of county commissioners."

This averment sets out, as matters of defense, two material questions of fact:

1st. A previous conversion of money by the treasurer, Edwards, to his own use; and

2d. Fraud on the part of the board of county commissioners in endeavoring to cover up the same.

On the first proposition the supreme court of the United States in the case of *Farrar v. United States*, 5 Peters, 389, say: "We feel no difficulty in affirming that for any sums paid to Rector, prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and

that is on the assumption that he still held the money in bank or otherwise. If still in his hands, he was, up to that time, bailee to the government; but upon the contrary hypothesis he had become a debtor or defaulter to the government and his offense had already been consummated. If intended to cover past dereliction, the bond should have been made retroactive in its action. The sureties have not undertaken against his past misconduct. They ought, therefore, to have been let into proof of the actual facts so vitally important to their defense, and whether paid away in violation or in execution of the trust reposed in him; if paid away, he no longer stood in the relation of bailee. . . ."

Referring to the bond here sued on, we find the following language, to wit: "Now, therefore, the condition of the foregoing obligation is such that if the said William G. Edwards and his deputies, and all persons employed in his office, shall well and faithfully and promptly perform all of the duties pertaining to the said office of treasurer, and the said William G. Edwards and his deputies shall pay, according to law, all moneys which may come into his hands as treasurer," etc.

By this it will be seen that there was nothing in the bond retrospective in its character, and the obligations of the sureties were for the future and not for the past. In the language of the supreme court quoted above: "They ought, therefore, to have been let into proof of the actual state of facts so vitally important to their defense."

2d. As matter of defense the defendants allege in their answer fraud on the part of the board of county commissioners. They aver that, "on the 7th day of September, 1875, and prior to the acceptance by them of the bond, the board of county commissioners proceeded to examine and did examine the books, papers and moneys of the treasurer, and after such examination reported, and caused to be entered in the minutes of their proceedings, an order or entry to the effect that they had examined



the books and accounts of the treasurer, and the moneys reported to be in the hands of said treasurer, and belonging to Missoula county, and that they found the same to be correct and properly accounted for. And at the time, the said board of county commissioners knew that the treasurer was a defaulter, and did not produce for examination or properly account for the sum of money belonging to Missoula county, and which his books showed should be in his hands. That at the time he presented to the board, as a portion of the county funds, a check on the Missoula National Bank, drawn in favor of the said W. G. Edwards, by one D. J. Welch; that the board did not examine said check as to its being genuine, or make any effort to find out if said check would be paid on presentation at said bank, but received it the same and counted it as a portion of the county funds reported by the treasurer as in his hands."

Section 92, article VI, Codified Statutes, provides that: "It shall be the duty of each county treasurer to receive all moneys belonging to his county, from whatever source they may be derived, and other moneys which are by law directed to be paid to him."

"All moneys received by him for the use of the county shall be paid out by him only on the order of the board of county commissioners, according to law, except when special provision for the payment thereof is or shall be otherwise made by law."

Applying this statute to the case at bar, it was clearly the duty of the treasurer to present to the board to be counted, money or vouchers upon which money belonging to the county has been legally paid in the course of his official business or transactions. He could not lawfully hold or present as a part of the county funds, in the settlement of his accounts with the board of commissioners, a check of a third party. Such a paper or instrument is not money in the legal acceptation of the term.

The check under consideration was signed by one D. J. Welch. The record shows that "David J. Welch" was one of the sureties on the original bond of Edwards, treasurer, and who sought to be released from further liability thereon. It may reasonably be assumed that David J. Welch, the surety, is the same person who signed the check in question. This fact, taken in connection with the circumstances existing at the time—the anxiety of some of the sureties to be released from the bond—was of itself sufficient to awaken suspicion in the minds of the commissioners of irregularity in the official acts of the county treasurer. A prudent and reasonable business man, under similar circumstances, and actuated by the same doubt or suspicion, would at once have instituted inquiry into the object or purpose for which the check was drawn and received, and whether it would be honored on presentation to the payer. But we again affirm that the check in question could not be held or counted by the commissioners, in their settlement with Edwards, as a part or portion of the money in his hands as treasurer, belonging to Missoula county.

The failure of the board of commissioners to make a proper settlement with the treasurer, Edwards, set up in the answer as a defense, was well pleaded, and the defendants should have been permitted to introduce evidence to support it.

Having thus far examined this case on its merits, as shown by the pleadings, it becomes evident to us that the court below erred in sustaining the motion of the district attorney, and rendering judgment for the plaintiff on the pleadings.

But another important question is presented for our consideration, before we arrive at a final determination of this appeal. On the 7th day of June, A. D. 18—, a suit was instituted by the board of county commissioners of Missoula county against the sureties on the original bond of the treasurer, W. G. Edwards, to recover

the amount of the defalcation alleged in the present action to have occurred. The suit was brought to trial before the honorable judge then sitting, a jury having been expressly waived, in and for the second judicial district, Missoula county. The court, in its findings of fact, said: "I find that the board of county commissioners did accept the bond given by Edwards in lieu of this bond, and, as far as it was in their power, release this bond and the sureties thereon; that the substituted bond was voluntarily executed."

"As a conclusion of law I find that the said board of county commissioners could accept an official bond in lieu of one previously given, if voluntarily executed, from the treasurer of the county, as in this case, and that therefore the defendants should recover judgment for their costs."

And judgment was accordingly entered.

From this judgment the board of commissioners appealed to this court. The cause was argued by counsel and duly submitted at the August term, 1877. The court, in rendering its opinion, say: "This action was commenced by the board of commissioners of Missoula county upon the official bond of Edwards, the county treasurer. This bond was executed December 19, 1873, to the board of county commissioners, and filed and approved according to law, and Edwards entered afterwards upon the discharge of his duties as treasurer. Some of the respondents, who were sureties upon the bond, wished to be released from the same, and a new bond was executed, filed and approved July 12, 1875. A settlement took place September 7, 1875, between Edwards and the county commissioners, and the new bond was accepted as a substitute for the original instrument. The term of Edwards expired March 5, 1876, and this action has been commenced to recover \$2,475, which Edwards failed to account for, and pay over to his successor. The court below rendered judgment for the respondents on the



ground that they had been released from liability by the execution and acceptance of the second bond.

“There is only one legal question for our consideration. Could the county commissioners, under the laws of the territory, accept the last bond of Edwards in lieu of the first? The county of Missoula is an organized county within this territory, and a body corporate and politic. It is empowered for certain purposes, one of which is the following: ‘To make all contracts, and do all other acts in relation to the property and concerns necessary to the exercise of its corporate or administrative powers.’ Codified Statutes, 433, sec. 1. The powers of the body corporate and politic must be exercised by the board of county commissioners. Codified Statutes, 434, sec. 3. ‘This board is authorized to examine and settle all accounts of the receipts and expenses of the county, and to examine, settle and allow all accounts chargeable against the county,’ and to ‘represent the county, and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law.’ Codified Statutes, 435, sec. 14. The county treasurer is required to ‘execute to the board of county commissioners of his county a bond with three or more sufficient sureties, to be approved by the board, and in such penal sum as they may direct; which bond, with the approval of the board indorsed thereon by their clerk, shall be filed in the office of the county clerk.’ Codified Statutes, 451, sec. 87. It is the duty of the county treasurer to collect, receive and pay out ‘all moneys belonging to his county.’ Codified Statutes, 452, sec. 92. He is also the collector of taxes in his county. Codified Statutes, 453, sec. 96. There is no statute which expressly empowers the board of county commissioners to require or accept new bonds of the county treasurer.

“It will be noticed that the county commissioners fix the penalty of the bond of the county treasurer, and decide

upon the sufficiency of the sureties, and that it is executed to the board of county commissioners for the use and benefit of the county. The object of the statutes which have been referred to is the protection of the county against any loss through the failure of the county treasurer to perform faithfully his official duties. The omission of the county treasurer to pay out according to law the moneys of the county, defeats the purposes for which the county has been organized. If the county commissioners cannot obtain these moneys on account of the insolvency of the sureties or a fatal defect in the bond, the corporate or administrative powers of the county cannot be exercised. There is only one remedy for this state of things, and a new bond which is good and sufficient must be executed by the county treasurer. This is one of the cases 'where no other provision is made by law.' The execution of the new bond is 'necessary to the exercise of the corporate or administrative powers of the county.' The transcript does not disclose the reasons which controlled the action of the county commissioners in requiring Edwards to give the new bond, although it appears that some of the respondents took the first steps to bring about this result. The good faith of the county commissioners is not questioned by the respondents, and this branch of the investigation is therefore unimportant.

"Can an action be enforced upon the second bond? Have the rights of the county of Missoula been impaired by the conduct of its board of county commissioners? In *Sweetser v. Hay*, 2 Gray, 49, Mr. Justice Metcalf says: 'Actions have been supported on bonds which no law required, when they were executed voluntarily and with proper conditions to procure the performance of official duty.' We find the following note in Dillon on Municipal Corporations: 'A bond given by the treasurer of a county for the faithful performance of his official duties to the board of supervisors of the same county, is a good

and valid bond, notwithstanding there may be no statute requiring one.' *Supervisors v. Coffinbury*, 1 Mich. 355; *People v. John*, 22 id. 461; 1 Dillon on Municipal Corporations, sec. 155. In *United States v. Tingey*, 5 Pet. 115, Mr. Justice Story says: 'We hold that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursements of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department, and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view.' In the case at bar the second bond was given voluntarily to the county of Missoula to secure the faithful performance of official duties. The interests of the public have not been injured by the action of the county commissioners. We think that this action should not have been commenced upon the original bond of Edwards."

We have deemed it expedient to quote at length the foregoing opinion of Mr. Justice Blake, on the first appeal, for the purpose of reviewing it in this connection. In that opinion it is said: "The court below rendered judgment for the respondents on the ground that they had been released from liability by the execution and acceptance of the second bond. There is only one legal question for our consideration. Could the county commissioners, under the laws of the territory, accept the last bond of Edwards in lieu of the first?"

The opinion then proceeds to the examination of the question with reference to the power and authority of the board of county commissioners under the laws of the territory. There can be no doubt that when, in the judgment of a board of county commissioners, the public



interests of their county would be better protected thereby, it is within the scope of their authority to require of the treasurer additional security, or that he execute a new bond for the faithful performance of his official duties. And we reaffirm, as a legal proposition, the views of the court on this point as announced in the opinion just cited.

Again, in that opinion, the court say: "Can an action be enforced upon the second bond?" etc. With this part of the opinion and the authorities there cited we urge no objection. We concur in the views therein expressed, and accept the conclusions arrived at by the court.

In conclusion, the court say: "In the case at bar, the second bond was given voluntarily to the county of Missoula, to secure the faithful performance of official duties. The interests of the people have not been injured by the action of the county commissioners. We think that this action should not have been commenced upon the original bond of Edwards, and the judgment of the court below is affirmed."

This extract from the concluding part of the opinion of the court is here modified, so as to correctly state the relation which the sureties on each of the two bonds sustain to the defalcation or delinquency of the treasurer, Edwards, as charged in the complaint. The bond first given by the treasurer recites: "That if the said W. G. Edwards and his deputy, and all persons employed in his office, shall well and faithfully and promptly perform all of the duties pertaining to the office of treasurer, and the said Wm. G. Edwards and his deputies shall pay according to law all moneys which may come into his hands as treasurer, and will render a just and true account thereof whenever required by the said board of county commissioners, or by any provision of law, and shall deliver to his successor in office, or any person authorized by law to receive the same, all moneys, bonds, papers and other things appertaining to his office, then the above obliga-

tion to be null and void; otherwise, to be and remain in full force and effect."

For all the purposes mentioned, the sureties on this bond were liable to the county commissioners up to the 7th day of September, 1875, and are still liable for any breach of the conditions of the bond by their principal prior to the 7th day of September, 1875, and not afterwards, by him or them, made good to the county.

While the second or new bond recited that is given as a substitute or in lieu of the original instrument, yet the extent of the liability of the sureties thereon is expressly stated to be "for the payment, according to law, of all moneys which shall come into his (Edwards') hands as treasurer," etc. If it was intended to hold the sureties on the second bond for past delinquencies of the treasurer, it should have been so stated and expressed in the instrument itself. The law that the liability of sureties on an official bond cannot afterwards be increased or diminished by implication is so well established that no citation of authorities in support of the same is necessary.

The judgment of the district court in the former suit was against the power of the county commissioners to bring or maintain an action to recover on the original bond of the treasurer, Edwards. An appeal was taken from that judgment to this court, where the same was affirmed. Afterwards a suit was commenced by the county commissioners to recover upon the second bond the amount of the alleged defalcation of the treasurer. In this suit judgment was rendered on the pleadings in favor of the respondent for the sum claimed in the complaint. In view of the law as now laid down by this court, the judgment was erroneous.

The judgment of the court below is reversed, with costs, and the cause remanded for a new trial.

*Judgment reversed.*

CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT,  
AT THE  
AUGUST TERM, 1881.

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TERRITORY, respondent, *v.* EDMONSON, appellant.

**EVIDENCE — Homicide — Preponderance of evidence to prove mitigating circumstances.**— In cases of homicide, the true and better rule, according to both principle and statute, is that matters of justification, excuse or mitigation should be proven, as any ordinary fact, by a preponderance of testimony; and it is error to charge a jury that such facts should be proven beyond any reasonable doubt.

*Appeal from First District, Jefferson County.*

JOHN H. SHOBER and J. K. TOOLE, for appellant.

The evidence in the case at bar in some essential points is very conflicting. The prosecuting witness, Shelton, testifies he was unarmed at the time of the alleged assault. The defendant and one Sullivan swear positively that Shelton was armed, and that he drew his revolver and held it in both hands towards Edmonson, before defendant fired. There is no conflict in the evidence that on a previous occasion, at the same place, Shelton was armed, and that he used some threatening language on that occasion towards the defendant, and the evidence is such that, under fair instructions, the jury might reasonably render a verdict of not guilty. Hence



the principal error relied upon by appellant is instruction No. 10, given by the court (see Transcript, pp. 32, 33), wherein the court instructed the jury that the defendant must prove his defense to the satisfaction of the jury beyond a reasonable doubt. This, we contend, was manifest error to the prejudice of defendant, and one upon which there is no conflict of authorities. *People v. Schryver*, 1 Am. Reps. 485; *People v. Schryver*, 42 N. Y. 1; *State v. Pierce*, 8 Nev. 292; *People v. McCann*, 16 N. Y. 38; *People v. Coffman*, 24 Cal. 230; 20 Cal. 518; *People v. Arnold*, 15 Cal. 482; 1 Nev. 544; *People v. Millgate*, 5 Cal. 127; *State v. Kellyer*, 43 Mo. 127; *Polk v. State*, 19 Ind. 172; *State v. Battell*, 43 N. H. 224.

2. Injury will be presumed where error appears. *Spangler v. Dellinger*, 38 Cal. 278; *Sweeney v. Riley*, 42 Cal. 407; *Stokes v. People*, 53 N. Y. 183.

3. We also contend that it was error in the court to refuse instructions Nos. 14, 13, 12 and 7. See pp. 27-30 of transcript.

GALBRAITH, J. The indictment in this cause was for an assault with intent to commit murder. The jury found the defendant guilty as charged in the indictment. The defendant, upon his trial, attempted to justify by endeavoring to show that the act constituting the alleged crime was done in self-defense. The testimony tending to show such justification was wholly introduced by the defendant, as none of the testimony of the prosecution indicated any state of circumstances which warranted the shooting. On the other hand, all the testimony of the prosecution was wholly inconsistent with, and tended to repel, such justification. Therefore this is a case wherein the attempted justification is wholly set up by the defense, and is repelled and rebutted by the prosecution. The testimony is of necessity very conflicting. This renders it more imperative to correct the error complained of, if, upon inquiry, we shall find it to have been

error. Upon the submission of the cause to the jury the court below gave the following instruction, viz.: "If the jury believe, from the evidence, that Edmonson shot Shelton, in manner and form as charged in the indictment, then, in order to justify the act as a matter of self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the shooting was absolutely necessary; and it must also appear that Shelton was the assailant, or that Edmonson had really and in good faith endeavored to decline any further struggle before the shooting. And it devolves upon the defendant to prove these facts of self-defense to your satisfaction, *beyond a reasonable doubt*; and if he has not done so, you should find the defendant guilty." It will be observed that the language of this instruction is identical with that of sec. 34 of the criminal laws in relation to the justification of self-defense in cases of homicide, with the exception of that portion thereof which makes its provisions apply to the crime charged in the indictment, and its conclusion, which is in addition to the language of the statute, and which requires that the jury should be satisfied of the facts of justification beyond a reasonable doubt. We think there can be no doubt that the circumstances which would constitute a defense in a case of homicide, would also constitute a defense in case of assault with intent to kill. An assault with intent to murder contains all the essential elements of the crime of murder, except the act of killing. The definition of an assault with intent to commit murder simply substitutes the attempt to kill for the killing itself. Therefore it may be presumed that the legislature intended that section 34 of the criminal laws, together with any other portion of such laws connected with and bearing upon it, should apply in the case of assault with intent to commit murder as well as in the case of murder itself.

Section 40 of the criminal laws applies to the justification of self-defense in cases of homicide, and consequently to the crime charged in the indictment, and is to be taken in connection with section 34. This section is as follows: "The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof upon the part of the prosecution sufficiently manifest that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide."

It will be observed that nowhere in this section appears the language "beyond a reasonable doubt," which is the phrase universally used by the profession and the law writers in relation to the amount or weight of evidence necessary to conviction in criminal cases. The omission of this phrase and the use of the language "burden of proof," and "sufficiently manifest," would lead us strongly to infer that the legislature intended that the facts of mitigation, justification or excuse need only be shown by a preponderance of testimony. Code of Civ. Pro. sec. 513. We are further inclined to the opinion that the legislature used these phrases in the above connection in view and as confirmatory of the rule of law generally prevailing in such cases. What the prevailing rule is we will very briefly consider.

The court of appeals of the state of New York in 1870 expressly overruled the law formerly prevailing in that state, viz.: that when the fact of homicide was made out, and the defendant attempted to justify, that then the burden was upon him to make out this defense beyond a reasonable doubt. *People v. Schryver*, 42 N. Y. 1. In this case it was held in substance that the facts of provocation must be established by a preponderance of testimony according to the rules which obtain in civil cases. Earl, C. J., delivering the opinion of the court, and referring to the case of *The People v. McCann*, 16 N. Y.



58, says: "The judge presiding at the trial in this case is said to have followed in his charge the case of *Patterson v. The People*, 46 Barbour, in which, in a case of homicide, it was held in substance that the prisoner was bound to prove his justification beyond a reasonable doubt. No authority is quoted to uphold this rule, and it is clearly against every authority that can be found in the books. The rule that the *corpus delicti* must be proved beyond a reasonable doubt was intended as a shield to the prisoner and must never be used as a sword. In the language of Lord Hale, *tutius semper est errare in acquittando, quam in puniendo, ex parte, misericordiae quam ex parte justitiae*.

"The people, in every case of homicide, must prove the *corpus delicti* beyond a reasonable doubt, and if the prisoner claims a justification, he must take upon himself the burden of satisfying the jury by a preponderance of evidence. He must produce the same degree of proof that would be required if the blow inflicted had not produced death, and he had been sued for assault and battery and had set up a justification."

In *William Silvers v. The State*, which was an indictment for murder (22 Ohio, 90), White, J., after reviewing some of the earlier and later English cases, also some of those of Massachusetts, New York, and former decisions of his own state, uses this language: "Where a party claims to control the legal effect of facts by the alleged existence of other facts, the burden is on him to show a preponderance of evidence in favor of the existence of the latter."

In *State v. Pierce*, 8 Nev. 291, the court below gave the following instruction: "If you believe from the testimony, beyond a reasonable doubt, that at the time and place above named the said George Wilson inflicted upon the person of this defendant a serious and highly provoking injury, sufficient to excite an irresistible passion in a reasonable person, and that then and there, without

any interval sufficient for the voice of reason and humanity to be heard, this defendant slew the said George Wilson in manner as charged in the indictment, you will find this defendant guilty of manslaughter." In commenting on this instruction, Whitman, C. J., uses the following language: "View this instruction in any legal light, even were such as multiform as the whirling changes of a kaleidoscope, and it must remain as it was written, wrong; so basely, indefensibly wrong, that its giving entitled the defendant to a new trial." "Under the strictest rule, there is always this distinction to be borne in mind between evidence to prove guilt and that tending to mitigate or disprove, whether it come from the prosecution or defense: that tending to prove guilt must be established beyond a reasonable doubt; that tending to mitigate or disprove, by a preponderance of evidence."

The supreme court of California, in *People v. Coffman*, 24 Cal. 230, has stated the rule in criminal cases thus: "It may be laid down as a general rule that preponderating proof is sufficient to establish a fact in defendant's favor."

We are satisfied, from an examination of the authorities generally, as well as from principle, that the correct and prevailing rule in cases of homicide is that the facts constituting mitigation, justification or excuse should be established by a preponderance of testimony.

In the criminal code of Illinois the same provisions exist as are contained in section 40 of our criminal laws. The language of both is identical. In that state, in a late case, where the court below, upon a trial for murder, charged the jury that "if they should find from the evidence, beyond a reasonable doubt, that the killing of Anna Alexander has been proved as charged in the indictment, then any defense which the defendant may rely upon in justification or excuse of the act, or to reduce the killing to the grade of manslaughter, it is incumbent upon the defendant satisfactorily to establish

by such defense." Mr. Justice Scott, delivering the opinion of a majority of the court, in commenting upon this instruction, says: "The statute has not required him to prove his defense. He is only bound to prove the circumstances of mitigation, or that justify or excuse the homicide, as any other fact is proved. The jury might well understand from the use of the words 'satisfactorily to establish such defense' that something more than mere proof of such circumstances was required. This is stating the rule of law broader than the law will warrant. The statute provides that he is only bound to prove circumstances that justify or excuse the homicide, as any other fact is to be proved, and as this instruction cast upon the accused what may well have been understood to be a higher degree of proof, it is plainly erroneous, and may have prejudiced the defense. A defense, though it might not be satisfactorily proven, yet might be supported by such proof as would produce grave doubts as to the guilt of the prisoner." *Alexander v. The People*, 96 Ill. 96. The dissenting opinion does not assume to attack the principle as above asserted by a majority of the court, but is rather confirmatory thereof. The instruction complained of cast a greater burden upon the defendant than the instruction given by the court in the case last referred to, for the giving of which the judgment was reversed. Whether, therefore, we view the instruction complained of in the light of the statute or of the prevailing rule of law in relation to such defenses, we must declare it erroneous. The jury, if instructed that the facts constituting the justification should be established by a preponderance of testimony, might have found a different verdict.

The judgment herein appealed from is reversed, and the cause remanded for a new trial.

*Judgment reversed.*



## TERRITORY, respondent, v. TUNNELL, appellant.

**MISDIRECTION TO JURY.**—Where the judge, in his charge and instruction to the jury, stated that the defendant admitted the shooting and killing of deceased as charged in the indictment, while the record showed the admission to have been that “the shot he fired killed Jones at the time and place alleged in the indictment,” it was such a variance as to mislead a jury, to the prejudice of the accused, and is ground to set aside the verdict.

The principal question raised on appeal in this case is essentially the same as in the case of *The Territory v. Edmonson*, decided at this term. See *ante*, p. 141.

*Appeal from First District, Jefferson County.*

—— —, for appellant.

—— —, for respondent.

GALBRAITH, J. The principal question in this case is essentially the same as that presented in the case of *The Territory v. Edmonson*, decided at this term.

We might also notice an additional error assigned by the appellant, viz., that the judge, in charging the jury, incorrectly stated in his instructions that the defendant admitted the shooting and killing of the deceased, as charged in the indictment, when, as the record shows, the defendant's admission was that “the shot he fired killed Jones, at the time and place alleged in the indictment.” This statement was evidently misleading in its character, and prejudicial to the defendant.

For this reason, and also for the reason assigned in the case of *Territory v. Edmonson*, above mentioned, we are of the opinion that the judgment in this case should be reversed.

It is therefore ordered that the judgment herein appealed from be reversed, and the case remanded for a new trial.

*Judgment reversed.*

## TERRITORY, respondent, vs. AH WAH and AH YEN, appellants.

*JURY — Indispensable number in trial of felonies — No waiver by consent.*— In the trial of all felonies, more especially of capital offenses, a jury of twelve men, neither more or less, is an indispensable requirement of the law. It is not a privilege that can be waived either by prosecutor or defendant, or allowed by court.

A trial of such a cause before a jury of eleven men, though with consent of defendants, is a nullity, and any judgment thereon without jurisdiction and void.

*Appeal from First District, Madison County.*

HENRY N. BLAKE and JAMES E. CALLAWAY, for appellants.

1. The grand jury by whom the indictment was found did not have jurisdiction to inquire into the offense charged. The transcript on appeal shows these facts:

(a) The appellants, on the first day of the March term, 1881, were in the county jail to answer the charge of murder in the first degree. They were brought into court, duly notified of their rights, and waived all objections to the grand jury. This grand jury was duly impaneled, sworn and charged, and, after inquiring into this charge, made a report in writing and failed to return a true bill against appellants.

(b) Afterwards, another grand jury was summoned at the same term of court, and returned the indictment against appellants.

(c) The appellants interposed their challenge to the panel of the second grand jury, which was overruled, and appellants excepted to the action of the court thereon.

(d) The appellants made a motion in arrest of judgment on the ground that said special grand jury had no legal authority to inquire into the charge against them. This motion was overruled and appellants excepted.

Appellants claim that, under the statutes of this terri-

tory, the first was the regular grand jury and had jurisdiction of the offense charged against them. Appellants duly waived in open court all objections to the members or panel of said grand jury. When the first grand jury failed to find an indictment, appellants were entitled to their discharge, and no grand jury could inquire into said charge until the succeeding term of the district court. The statutes of this territory are similar to those of California in this respect, and contemplate one regular grand jury for each term of the district court. When cases are not cognizable by such grand jury, another grand jury can be impaneled to inquire into them. The second grand jury could consider any offense "discovered or committed during the sitting of the district court, or a charge which the first or regular grand jury was not competent to investigate." The statute, by this limitation upon the jurisdiction of the second grand jury, excludes all other cases. *Expressio unius est exclusio alterius*.

Appellants were not embraced within these classes, and, therefore, the second grand jury had no legal authority to find the indictment against them. R. S. Mont. p. 393, sec. 141; *People v. Monahan*, 32 Cal. 72; *People v. Southwell*, 46 Cal. 153; *Mousseau v. Veeder*, 2 Oregon, 113.

2. The court erred in refusing to allow A. J. Bennett, the foreman of the first grand jury, to testify concerning the evidence of the witness Ong Soon before that grand jury. The transcript shows that the testimony of Ong Soon, on the trial, was very strong against appellants. Appellants sought to affect the credibility of this witness and the weight of his testimony by proving that his testimony before the grand jury was different from that given before the trial jury. The testimony of Bennett was material to appellants. The objection thereto by the territory is general. In *Shober v. Jack*, 3 Mont. 356, this court says: "When a party objects to a witness as



incompetent he should show wherein he is not competent. It is never presumed that a witness is incompetent."

In *Roper v. McFadden*, 48 Cal. 346, it is held that it is not error to admit irrelevant testimony, if no objection is made that it is irrelevant.

In *People v. Manning*, 48 Cal. 335, the court says: "A party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified."

While appellants insist that such an objection cannot be entitled to any weight on account of its vague and informal character, we maintain that Bennett was a competent witness under the laws of this territory and decisions under similar statutes.

"Members of the grand jury may be required by any court to testify whether the testimony of a witness, examined before such grand jury, is consistent with *or different from the answers* given by such witness before such court." R. S. p. 391, secs. 128, 130; *Commonwealth v. Hill*, 11 Cush. 137; *Commonwealth v. Mead*, 167-170. Grand jurors in this territory are not sworn to secrecy. R. S. p. 390, sec. 126; 1 Bishop's Cr. Pr. (1st ed.) secs. 729, 730; *Perkins v. State*, 4 Ind. 222; *Burnham v. Hatfield*, 5 Blackf. 21; *State v. Broughton*, 7 Ired. 96; *Sands v. Robison*, 12 Sm. & M. (Miss.) 704; 1 Whart. Cr. Law, secs. 508-512; *State v. Wood*, 53 N. H. 484; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181; *People v. Young*, 31 Cal. 563; *State v. Brewer*, 8 Mo. 338; *United States v. Porter*, 2 Cranch C. C. 60; *United States v. Charles*, id. 76. Mr. Bishop says: "Here is a strong current of American decisions, all setting one way." 1 Cr. Prac. sec. 729, n. 4.

3. In this connection, appellants call attention to the principle that when the evidence in a criminal case is not plainly inadmissible, the better practice is to let it go in without objection. *People v. Williams*, 18 Cal. 187;

*People v. Devine*, 44 Cal. 452; *People v. Benson*, 52 Cal. 380.

4. The court erred in not giving to the jury the second instruction asked for by appellants. It is held in some states that, under similar circumstances, the presumption is that the crime constitutes murder in the second degree, but we know of no cases holding that there would be a presumption that the crime was murder in the first degree. 2 Bishop Cr. Pr. (1st ed.) sec. 606; *State v. Turner*, Wright (Ohio), 20; *People v. Ah Fung*, 16 Cal. 137; *People v. Gibson*, 17 Cal. 283; *People v. Belencia*, 21 Cal. 543; *Milton v. State*, 6 Neb. 136; *Cathcart v. Commonwealth*, 1 Wright (Pa.), 108; *McCue v. Commonwealth*, 78 Pa. St. 185; *State v. Holmes*, 54 Mo. 153; *State v. Underwood*, 57 Mo. 40; *Hill v. Commonwealth*, 2 Gratt. (Va.) 594.

5. The court erred in refusing to give to the jury the third instruction asked for by appellants. An intent to murder cannot be conclusively inferred from the mere use of a deadly weapon. *State v. Newton*, 4 Nev. 412; *Thomas v. People*, 67 N. Y. 224-5.

6. The court erred in giving to the jury the eighth instruction. A juror has not the legal right to believe a part of the testimony, and disbelieve a part thereof, according to his judgment or discretion. The instructions should have been qualified by stating that this judgment or discretion must be exercised upon a consideration of all the facts and circumstances of the case, or that jurors must have sufficient grounds for action, or belief or unbelief. *People v. Strong*, 30 Cal. 151-158; 1 Greenl. Ev. sec. 218. A witness is presumed to speak the truth, and the statute shows how this presumption may be repelled. R. S. p. 168, sec. 601.

7. The instruction numbered 9½ was ambiguous, and tended to mislead the jury, and was in conflict with the first clause of the eighth instruction.

In *Territory v. Owings*, 3 Mont. 139, this court says:

"But where the instructions set up for the jury contradictory rules for their guidance, which are unexplained, and following either of which might or would lead to different results, then the instructions are inherently defective and calculated to confuse and mislead the jury."

The jury are the exclusive judges of the weight of the evidence, and the court erred in this instruction, that one class of witnesses "is entitled to far greater weight in the minds of the jury" than another. The court thereby passed upon the weight of the evidence, and usurped the province of the jury. The transcript shows that some witnesses for appellants testified that they did not see certain witnesses for the territory at the place where they claimed to have been, and also that they did not see appellants stab or strike the deceased. The weight of this testimony for appellants was destroyed by this instruction, and appellants were prejudiced thereby.

In *People v. Williams*, 17 Cal. 147, the court says: "A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts."

In *State v. Van Winkle*, 6 Nev. 340, it was held error for the court to instruct the jury that "circumstantial evidence is more satisfactory than the testimony of a single individual who swears he has seen a fact committed."

The court held that this instruction in effect decided a question of fact and not a rule of law. *People v. Eckert*, 16 Cal. 110; *People v. Barry*, 31 Cal. 357; *People v. Dick*, 32 Cal. 213; *McNeil v. Barney*, 51 Cal. 603.

\* 8. The thirteenth instruction is a copy of section 40, page 469, Revised Statutes of the territory, without any explanation or qualification. It is ambiguous and misleading, and therefore erroneous. The court should have stated the presumption, if the killing *by appellants or either of them* was established. The two appellants were



on trial. The proof of the killing by one appellant would not put the other upon his defense. The fact of the killing alone, without proof that it was effected by appellants, would not devolve on appellants the burden of establishing any facts. Appellants were prejudiced by the ambiguity of this instruction. In *State v. McGinnis*, 5 Nev. 337, Lewis, C. J., says: "In a criminal case, any ambiguity which may have a tendency to mislead the jury should entitle the prisoner to a new trial." *People v. Maxwell*, 24 Cal. 14; *People v. Murphy*, 29 Cal. 103; *State v. Van Winkle*, 6 Nev. 340; *Ritte v. Commonwealth*, 18 B. Mon. 35.

9. The fourteenth instruction was erroneous because the indictment did not charge that Ah Yen, one of the appellants, stood by and aided, abetted or assisted Ah Wah, the other appellant. The statutes of this territory are similar to those of California and Nevada, which require an indictment to contain "a statement of the facts constituting the offense." R. S. p. 397, sec. 164. The law concerning accessories is the same. R. S. p. 399, secs. 176, 177; also p. 463, sec. 12. Ah Yen could not be convicted under the evidence of any offense within the indictment. 1 Bishop Cr. Pr. (1st ed.) sec. 547, n. 1; *State v. Chapman*, 6 Nev. 320, 331; *People v. Schwentz*, 32 Cal. 160, 164; *People v. Trim*, 39 Cal. 75; *People v. Campbell*, 40 Cal. 129; *People v. McGungill*, 41 Cal. 429; *Walrath v. State*, 8 Neb. 80; *Shannon v. People*, 5 Mich. 71; Wharton on Homicide, 156, 157.

10. The fifteenth instruction withdrew from the consideration of the jury a large part of the testimony. The transcript shows that the evidence had been offered by both parties and received without objection; that witnesses had been examined and cross-examined thereon; and that no motion to strike out the same had been made. Under such circumstances, evidence cannot be withdrawn from the jury unless all the parties consent thereto. The testimony so excluded affected the credibility of wit-

nesses for the territory and appellants were injured by this instruction.

In *People v. Long*, 43 Cal. 444, Wallace, C. J., says: "The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated."

By the cross-examination of a witness, the party waives the motion to strike out his testimony. In this case the court did by its instruction what the parties could not do by a motion to strike out. *Sharon v. Minnock*, 6 Nev. 377; *Brooks v. Crosby*, 22 Cal. 42; *Davis v. Davis*, 26 Cal. 23; *Curiac v. Packard*, 29 Cal. 194; *Janson v. Brooks*, 29 Cal. 214; *King v. Haney*, 46 Cal. 560; *Lovering v. Langley*, 8 Minn. 107; *Donelson v. Taylor*, 8 Pick. 390.

11. The nineteenth instruction was erroneous, because it stated in substance that the evidence of an *alibi*, to prevail, must cover the whole time of the alleged offense. *State v. Waterman*, 1 Nev. 543; *Adams v. State*, 42 Ind. 373; *Kaufman v. State*, 49 Ind. 248; *State v. Henry*, 48 Ind. 403; *State v. Northrup*, id. 583; *State v. Jaynes*, 78 N. C. 504; *Davis v. State*, 5 Baxter (Tenn.), 612; *Wiley v. State*, id. 662.

12. The transcript shows that Michael A. Halfield, one of the trial jurors, was excused during the trial, and that the verdict was returned by eleven jurors who remained in the panel. The verdict was void and the court could not render judgment thereon. The consent of appellants could not confer jurisdiction on the court, or cure the verdict. A trial by jury is a trial by twelve men acting with unanimity. Upon these propositions the authorities are uniform. *Kleinschmidt v. Dunphy*, 1 Mont. 118; *Cancemi v. People*, 18 N. Y. 128; *People v. O'Neil*, 48 Cal. 258, and cases cited. The attorney-general confessed the error. *Brown v. State*, 6 Blackf. 451; *S. C.* 16 Ind. 496; 1 Bishop Cr. Pr. sec. 761; *State v. McClear*,

11 Nev. 39, 60; *State v. Mansfield*, 41 Mo. 470; *Hill v. People*, 16 Mich. 354; *Bell v. State*, 44 Ala. 393.

13. There was no evidence to support a verdict against Ah Yen. The deceased received one wound only, and this was mortal. Ah Yen said nothing and did nothing before the deceased received the mortal wound. No conspiracy between the appellants was shown. The mere presence of Ah Yen did not make him an aider or abetter. *People v. Leith*, 52 Cal. 251; *White v. People*, 81 Ill. 333; *Connaughty v. State*, 1 Wis. 159; *Butler v. Commonwealth*, 2 Durell (Ky.), 435.

14. For the reasons given, the motions for a new trial and in arrest of judgment should have been sustained.

In *Nevada v. Van Winkle*, 6 Nev. 346, the court says: "Error being shown, the burden of establishing its immateriality is on the state, and in criminal cases the showing of immateriality must be conclusive."

E. W. TOOLE, for respondent.

1st. The real questions to be determined upon appellants' challenge to the panel of the grand jury, finding the indictment upon which the trial and conviction were had, are: 1st. Was it legally impaneled? 2d. Did it have authority to inquire into the offense charged? Upon the first proposition, we submit that sec. 141, page 393, does not in any manner attempt to limit the powers of the grand jury, but only defines the events or emergencies upon which a new grand jury can be impaneled. It places no restriction or limitation upon its powers when once formed. In the absence of this, its powers would be such as are delegated generally to a grand jury.

But to set this question at rest, by section 142 the mode of summoning such new grand jury is specifically pointed out, while its power when so summoned and impaneled is expressly defined by law. Sec. 143.

The maxim quoted, "*Expressio unius est exclusio alterius*," is improperly applied by appellants. If we apply



it to the causes or grounds upon which a new grand jury may be impaneled, it will be seen from section 141 and the order of the court that this maxim is fully observed. If applied to sec. 143 and the indictment upon which the conviction was had, it will be found that this maxim has in no wise been violated. The grounds existed for forming the jury, and the offense was one cognizable by it when once impaneled.

It would be tacitly implied by section 141 that the grand jury "could inquire into, and it is their duty to inquire into, all public offenses committed or triable within the jurisdiction of this court and to present them to the court by indictment;" but by section 143 it is expressly so provided, and under the maxim "*Expressum facit cessare tacitum*," we can ignore that which would otherwise have been implied. We can safely stand upon the maxim quoted by appellant and the express provisions of the statute. The case of appellants is embraced within it. The former grand jury had not ignored an indictment against them, and the one upon which they were tried was in strict conformity with the statute. If an offense was committed during the sitting of the court and after the regular grand jury had been discharged, the new grand jury was properly formed, and sec. 143 in direct terms empowered it to find the indictment in this case. See order of court, record, page 3. In this view of the case, the authorities cited by appellant are inapplicable.

2d. The point sought to be made by appellants touching the generality of the objection of respondent to the proffered testimony of Bennett, foreman of the grand jury, would be good law and the authorities cited applicable if the court had overruled the objection and the objecting party had excepted. In that case he should point out the particular grounds of his objection. But when the objection is sustained, and for any reason the evidence offered is incompetent, the ruling is proper, and no injury

is sustained. To this extent, and no further, do the authorities go.

Appellants have failed by their exception to show that the evidence offered was competent. They must show error, otherwise the ruling of the court will be sustained. The statute in reference to the testimony of the grand jurors goes to the question of their *competency alone*. All the other rules as to the competency of the evidence, and especially as to its admissibility, are applicable. It nowhere appears that the witness sought to be impeached was inquired of as to his evidence before the grand jury. He was not interrogated as to whether he did not testify to certain facts so as to lay the foundation for his impeachment.

Sec. 128 in no way abrogates the general rules as to the admissibility of evidence in any respect, save that the grand juror and his testimony is competent, if in other respects the foundation for its admission is properly laid. He stands in this respect as any other witness. Besides, the section provides that "the *grand juror* may be required by any court to testify whether the testimony of a witness examined before *such grand jury* is *consistent with* or different from the answers given by such witness before such court." The question propounded was, "What did said Ong Soon testify to before said grand jury concerning the killing of Ah Sue?"

We submit, 1st. That it is for the *witness (i. e., grand juror)* to testify whether the testimony of the witness before the court is consistent with or different from that given before the grand jury. To give the evidence would leave it to the trial jury to determine this fact, while the mode of impeachment expressly provided by the statute makes it the province of the grand juror himself to "testify whether the testimony given before the grand jury was consistent with or different from that given before the court." He alone, under the law, is to judge of this, and his statement in that behalf is

the evidence to go before the trial jury. No such evidence was offered. Again, he does not state that he remembers any of the witness' testimony before the grand jury, and did not hear his evidence before the court. How, then, could he testify whether such evidence was consistent with or different from that given before the grand jury? Yet this is exactly what the statute says he may be required to testify to, and "*expressio unius est exclusio alterius*." Besides, the grand juror states that he took minutes of the evidence before them, that he did not have those minutes with him, and does not state that he is able to testify without them. The grand juror on the stand was not present, and did not hear the evidence of the witness to be impeached; was not even told what he had testified to so as to enable him to swear *whether* such evidence was *consistent* with or different from that given before the grand jury. When a grand juror is a witness in this particular, he is made an expert, so to speak. As a member of one branch of the court, the grand juror is made the *person* to say whether the evidence given before the trial jury corresponds to *that* given before the grand jury, and not the panel jury. Under the theory of appellants, admitting that the foundation for the evidence was properly laid, and that the grand juror had shown himself possessed of sufficient knowledge to testify as to the matters inquired of, the trial jury are made the judges as to whether the evidence given before them was consistent with or different from that given before the grand jury, instead of the grand juror who heard the evidence before that body, and is presumed to have heard it before the court. This is not the law, and is directly inconsistent with the theory upon which such evidence is admissible under sec. 128, above quoted.

Sec. 128 defines what it is lawful for a member of the grand jury to testify to, and sec. 130 must be construed with reference thereto. The language of this section is:



"No grand juror shall disclose any evidence given before the grand jury, . . . except when *lawfully* required to testify as a witness in reference thereto." Sec. 128 provides when such grand juror may be lawfully required to testify and to what he may be required to testify, *i. e.*, "whether such testimony given before the grand jury was consistent with or different from that given by the witness before the trial court. The two sections construed together seem to us to be conclusive of the question. The law nowhere provides that a member of the grand jury may be required to give evidence of the facts testified to by a witness before that body, and yet this is just what the interrogatory propounded sought to elicit from the witness Bennett.

3d. The third point made by appellant, that in cases where the court is in doubt as to the admissibility of evidence in a criminal case, that it is better to admit such evidence, is a rule peculiarly applicable to the court below. But when an appeal is taken and the judgment of the court below sought to be reversed on account of the refusal to admit evidence, it devolves upon the appellant to show error. The appellate court must determine these questions and make certain by its decisions that which was before doubtful. It must be settled then like any other legal proposition; and although it may signify by its decision the better course to be pursued by the court below in case where that court is in doubt, we have yet to find a decision of a supervisory court where it has expressed its doubt upon such a question, and thereupon reversed the judgment appealed from. In expressing doubt in such matters it would seem to us to be its province to pass its best judgment upon the question presented. In this way alone can such uncertainties be settled and the law pronounced. It would seem a remarkable course for an appellate court not to pass upon these questions according to legal principles, reverse a case, and establish a precedent contrary to its best judg-

ment. It would become an adherent to what was not law, instead of an exponent of what was law. Counsel would say, don't take the side you believe to be right for fear you will be wrong.

The cases referred to are simply suggestions to prosecuting attorneys, that in case of doubt it is best to permit evidence to go to the jury *without objection*. But here the objection is made, exception taken, and the question of its admissibility directly presented. The ruling is presumed to be correct. *Moore v. Massini*, 43 Cal. 389. The court by its order, made a part of appellants' bill of exceptions, shows that the former grand jury was an incompetent one to inquire into the case. Hence all the objections upon that point are unavailable. It shows that no competent grand jury had existed to ignore any indictment. See Record, p. 3.

4th. As to the fourth point made by appellants, the proposition referred to (if correct law) was fully covered by other parts of the charge. See *Territory v. McAndrews*, 3 Mont. 164. Besides, the instruction offered is unintelligible, apparently intending to present an *abstract proposition of law*, leaving out of it an important element, in this: The law raises no presumption unless the killing was with a deadly weapon, in the absence of facts showing the circumstances of the killing. The court in its charge told the jury in substance that the killing must be shown to have been done in *manner* and *form*, and at the time and place alleged in the indictment, in order to convict defendants of murder in the first degree. This was in effect the instruction offered by appellant. It directed the jury that unless it was shown that the accused with a deadly weapon, wilfully, deliberately and premeditatedly, and of his malice aforethought, killed the deceased at the time and place charged, they could not find defendants guilty of murder in the first degree. This enunciated the principle intended by the second instruction offered by the appellants, in stronger and

more favorable terms for the accused. The whole charge must be taken together, and if it correctly presents the law as a whole, the court will not reverse the case. *State v. Prichards*, 15 Nev. 74. And so this court has frequently held.

The same is true of the third instruction offered; the word "bare" before the word "use" being left out, destroys the legal principle intended to be presented. The killing with a deadly weapon, in the absence of this word, may or may not be murder in the first degree, according to the circumstances of the particular case. It would therefore be error to say that from the use of a deadly weapon it cannot be conclusively presumed that the crime was murder, unless it be added in the absence of any evidence of the manner and circumstances under which it was used, or limited by the phraseology above suggested, *i. e.*, "the bare use," etc. But the court told the jury, not only that they could not convict of murder under the circumstances suggested, but that, in order to do so, it must be established on the part of the prosecution, beyond a reasonable doubt, that the killing was with a deadly weapon, and wilfully, deliberately and premeditatedly done, without provocation, etc.

6th. The authorities cited do not support the objection urged to the eighth instruction. The court properly told the jury that they were the exclusive judges of the weight of evidence and credibility of the witnesses, and that they were at liberty to believe or disbelieve so much of the evidence as *commends* itself to their *judgment* and *conscience*. In other parts of the charge they are told that a conviction, if had at all, must be upon the evidence beyond a reasonable doubt. The former part of sec. 601, p. 168, Codified Statutes, in defining what may repel the presumptions of the truth of the statements of a witness, neither adds to or detracts from the latter part of the section, which provides, in general terms, that "the jury are the exclusive judges of his credibility." It,



in substance, tells the jury that they cannot arbitrarily discredit and disregard the evidence of a witness, but that it must be done upon grounds that *commend* themselves to their *judgment* and *conscience*. There must be something for the judgment and conscience to act upon, it is true; but where the jury are the exclusive judges of the credibility of the witness, the court would never assume to direct them as to what facts, circumstances or reasons should be considered in connection with the exercise of this *judgment* and *conscience*. The court fully exercised its province in directing the jury as to what evidence was competent, leaving it to the judgment of the jury to determine as to its weight and the credibility to be given to the witnesses.

7th. The defendants could not be prejudiced by the ninth and a half instruction complained of. The jury had been fully instructed that they were the exclusive judges of the weight of the evidence. This instruction only attempts to define the character or grade of the testimony. The court could tell the jury what was primary or secondary evidence. It could tell the jury that a witness clearly impeached, in their opinion, was not entitled to the same weight as a truthful and credible witness, or that a person who testified to a fact the existence of which it was a physical impossibility for him to know, was not entitled to the same credit as one having the means of information and testifying therefrom. It only says to the jury that one who knows a thing, who is truthful and credible, and testifies about it, is entitled to more weight than one that does not. The use of the words truthful and credible in such cases embodies the only element to which the question of weight of evidence could apply, and this is left to their judgment. The other is an axiom.

The only grounds upon which a jury could weigh the evidence of one that knew whereof he spoke, and one that did not, would be upon the basis of their credibility. If A. should testify that he walked from Helena to Wash-

ington city in a day, and the other evidence showed to the jury that it was *three thousand* miles from one place to the other, of which fact the jury were satisfied, it would be no error in the court directing the jury that, when a man testified to an impossibility, it was not entitled to equal weight with that of a truthful man testifying to possibilities. This is not directing the jury as to the weight of evidence in the sense used in the statute. It is simply telling the jury that a certain class of evidence is better than another. The use of the word "weight" must be taken in its proper connection in construing its import, in order to see whether it is used in violation of the sense of the statute. It must mean the weight of evidence of a similar grade or character, leaving to the court to direct as to the force to be given certain grades or character of evidence, comparatively speaking. In the very nature of things no injury could occur.

8th. The eighth error assigned in appellants' brief is given in the language of the statute. It is applicable to the case, is not ambiguous or uncertain, and, when taken in connection with the instructions as a whole, could not be misinterpreted or mislead the jury. The instructions tell the jury in plain terms that if the killing was done by one under such circumstances as constituted the crime of murder, the other could not be convicted, except upon evidence beyond a reasonable doubt that the other was present, aiding, abetting, etc.

9th. The fourteenth instruction was correct. Our statute (sec. 176, p. 399) provides for the indictment, trial and conviction of the accused as a principal. The authorities cited are not applicable to the case at bar. The indictment was good, no objection was made to the evidence, and the instruction was based upon it.

10th. The evidence excluded by the fifteenth instruction was utterly incompetent and properly withdrawn from the jury. The objections and exceptions taken by respondents were not properly a part of the record in the

case. This being so, it would devolve upon the appellants to show *affirmatively that no such objections* or exceptions were taken, if there was anything in the point. The presumptions are that such were the facts; and unless it was necessarily and properly a part of the record in the case, the record should show affirmatively, and plaintiff's bill of exceptions set out specifically, that such evidence was admitted by both parties without objection. Had appellants sought to do this, the court would not have allowed such statement, because incorrect. To assume, in the absence of an affirmative showing that the evidence was admitted without objection, *if appellants' position* is correct, would *presume* error, which is never the case. The objections or want of objections of respondent are not properly in this record, unless incorporated in it by appellant by bill of exceptions, to rebut the presumptions that the rulings of the court were legal and proper. It cannot be said that the presumptions that the proceedings of the court below were correct, are overcome by the want of the appearance of something in the record that is not required to be in it. See *Seaward v. Malotte*, 15 Cal. 304; *People v. Best*, 39 Cal. 690; *Moore v. Massini*, 43 Cal. 389.

11th. The court gave the instruction with reference to an *alibi* more favorable to defendants than the authorities cited by appellants require. The generation of a reasonable doubt, under the instructions of the court, was as fatal to a conviction as a total failure of proof. The court, in this instruction, told the jury if the absence of defendant did not cover the time of the commission of the offense, it could be considered as to raise a reasonable doubt, and expressly in its charge instructed the jury that, in the event of such doubt, they should acquit.

12th. There was evidence to support the verdict of the jury, and upon it the jury found that the accused were guilty beyond a reasonable doubt. The indictment charged both with murder; the same evidence against



both was admitted without objection under it, and the instructions were based upon and applicable to the evidence in the case.

We submit that upon all the foregoing propositions there is no error shown. That in no instance can it be said that the rights of the accused have been prejudiced. The instructions, taken as a whole, present the law favorably to defendants, and they have no cause of complaint in that respect.

13th. The remaining proposition is one involving constitutional questions of grave importance to the state and citizen, and should be solved and settled upon principles applicable to the interpretation of that instrument. The right of the defendant in case of felony to waive a constitutional jury and try his cause with a less number, is a more serious question, and about which courts of equal respectability differ; but when the question is considered in the light of reason and analogy, it seems to us that the right exists, though it must be admitted that the authorities, numerically considered, are against the proposition.

The case of *Dunphy v. Kleinschmidt*, 1 Mont. 118, cited by appellant, does not support the proposition; that was a question whether the legislature could legislate away a right of a party against his consent; and the case of *The State v. McClean*, 11 Nev. 39, 60, is to the same point; but the question here is one of *consent* or waiver.

The case of *People v. O'Neil*, 48 Cal. 253, was a case similar to the one at bar, but it appears from the opinion that the question was not considered upon the authorities, but, the error being confessed by the attorney general, the point was sustained by the court.

The case of *The People v. Cancemi*, 18 N. Y. 128, meets the question squarely, and decides the point against us. The question, however, was a new one then, and the court was not furnished with an authority pro or con.

The other authorities cited by appellants have not

come to our hands, and no examination has been made of them.

The latest judicial determination of this question was had in 1879, by the supreme court of Iowa, in the case of *The State v. Kaufman*, where, in the light of all the authorities, it is held that a defendant may consent to a less jury than twelve. *State v. Kaufman*, 33 Am. R. 148. The court says: "A conviction can only be legally obtained in a criminal action upon competent evidence; yet if the defendant fail at the proper time to object to such as is incompetent, he cannot afterwards do so. He has a constitutional right to a speedy trial, and yet he may waive this provision by obtaining a continuance. A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. This, it seems to us, effectually destroys the force of the thought that "the state (the public) have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law."

But following the analogy further, "the defendant shall enjoy the right to be confronted with the witnesses against him;" and yet it has been held that where the prosecution present an affidavit for continuance on the ground of the absence of material witnesses, the defendant may waive this right, admit the affidavit and proceed to trial. This is the practice in civil cases, which the court holds to be applicable in criminal cases. *Territory v. Perkins*, 2 Mont. 467.

So, also, when a defendant in a criminal case becomes a witness at his own request, he thereby waives the constitutional provision that one accused person cannot be compelled to give evidence against himself. *State v. Wentworth*, 20 Am. R. 668; 65 Maine, 234.

If one can be waived why not the other?

A party is entitled to compulsory process for his witnesses, yet the court say it can be made conditional. He shall not be required to testify against himself, and yet he may waive it.

WADE, C. J. This is an indictment for murder. During the progress of the trial, one of the jurymen was excused on account of sickness in his family, and thereupon, with the consent of the defendants, the trial proceeded to a final conclusion before the remaining eleven jurymen, who returned into court a verdict against the defendants of murder in the first degree.

Had the defendants, with the consent of the prosecution and the court, in a capital case, the right or authority to waive a trial before a jury of twelve men?

A common law jury consists of twelve persons. That is the jury secured and guarantied by the constitution. By the law of the land, a jury of twelve persons forms a part of the tribunal before whom a defendant charged with a capital crime is to be tried. Can a defendant, on his own motion, change the tribunal and secure to himself a trial before a jury not authorized by and unknown to the law?

We know of no authority authorizing anything of the kind in a capital case. Instances may be found in the books in cases of misdemeanors, and also, but more rarely, in cases of felonies, where it has been held that a defendant might waive his right to a jury of twelve and consent to be tried by a less number; but the weight of authority in cases of felony is clearly against the proposition.

The law has established certain tribunals, with defined powers and forms of proceeding, for the trial of persons charged with crime. Security to the defendant and to the public is only found in a strict compliance with the law of the land. Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the prosecution or the defendant, by any act of their own, can change or modify the law by which criminal trials are controlled.

If, with the consent of the court and the prosecution, the defendant may have a trial with one jurymen less than a constitutional jury, why, with like consent,



might he not have a trial with one jurymen more than a constitutional jury? If, by his own act, the defendant might take one from a lawful jury, we do not see why he might not add one thereto. In either case there would be a failure of jurisdiction, because jurisdiction attaches and makes valid a verdict when rendered by a jury, and a jury is twelve men.

In civil actions the statute expressly provides that in case a jurymen becomes sick and is excused, the trial, with the consent of the parties, may proceed before the remaining eleven jurymen, but even in civil actions this could not be done except by virtue of a statute authorizing it, and hence the statute was enacted. In the absence of a statute consent would not confer jurisdiction. By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration.

In the case of *Cancemi v. The People*, 18 N. Y. 136, the court says: "Criminal prosecutions involve public wrongs," a breach of public rights and duties which affect the whole community, considered as a community, in its social and aggregate capacity. 3 Bl. Com.; 2 id. 4, 5. The end they have in view is the prevention of similar offenses, not atonement or expiation for crime committed. Id. 11. The penalties or punishments for the enforcement of which they are a means to the end are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away "without due process of law" (Const. art. I, sec. 6), when forfeited, as they may be, as a punishment for crime. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. . . . These considerations

make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws.

Effect may justly and safely be given to such consent in many particulars, and the law does, in respect to various matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admission of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what without it would be erroneous.

. . . But when issue is joined upon an indictment, the trial must be by the tribunals, and in the mode which the constitution and laws provide without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant. Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated.

In the case of *The State v. Mansfield*, 41 Mo., Wagner, J., says: "A jury must consist of twelve men, no more, no less; no other number is known to the law, and they must appear upon the record to have rendered their verdict." *Rex v. St. Michaels*, 2 Blackst. 719; *Dixon v. Richards*, 2 How. 771; *Jackson v. State*, 6 Blackf. (Ind.) 461; *Brown v. State*, id. 561. The petit jury, says Chitty, must consist of precisely twelve, and is never to be more or less, and this fact it is necessary to insert upon the record. If, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed on error. 1 Chit. Crim. Law, 505.

After commenting upon the reasons given in the case of *Cancemi v. The People*, above cited, Judge Wagner further says: "Another good and sufficient reason, it occurs to us, is, that the prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. He can unquestionably waive many of his legal rights or privileges. He may agree to certain facts and dispense with formal proofs; he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors; but he has no power to consent to the creation of a new tribunal unknown to the law to try his offense. The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and a defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence. The law as to criminal trials should be based upon fixed standards, and should be clear, definite and absolute. If one juror can be withdrawn, there is no reason why six or eight may not be, and thus the accused, through persuasion or other causes, may have his life put in jeopardy or be deprived of his liberty through a body constituted in a manner unknown to the law. Aside from the illegality of such



a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him."

In *Hill v. The People*, 16 Mich. 357, the court says: "The true theory, we think, is that the people, in their political or sovereign capacity, assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such; and upon them, therefore, devolves the responsibility not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals the panels of jurors and other safeguards for his trial, in accordance with the constitution which secures his rights. The government, the officers of the law, bring the jurors into the box; he has no control over the matter who shall be summoned or compose the panel, upon which he may exercise the right of challenge; and the prosecution must see that electors only are placed therein, as the law requires.

"But independent of all theories, and as a practical question, we think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority, which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land.

"Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered

away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction.

"It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction." See, also, *People v. O'Neil*, 48 Cal. 258; *Carpenter v. The State*, 5 Miss. 163; *Jackson et al. v. The State*, 6 Blackf. 461; *Brown v. State*, 16 Ind. 496; *Bowler v. State*, 5 Sneed (Tenn.), 360; *Bell v. State*, 44 Ala. 393; *Williams v. State*, 12 Ohio St. 622; *Allen v. State*, 54 Ind. 161; 1 Bish. on Crim. Pr. sec. 761; Proff. on Jury Trial, sec. 113; *State v. McClew*, 11 Nev. 39, 60.

In opposition to these authorities is that of *The State v. Kaufman*, 51 Iowa, 578, where it is held that, upon a trial for a crime, the defendant may waive his right to trial by a jury of twelve men, and with his consent may be tried before eleven jurors. This decision cites for its support the cases of *The Commonwealth v. Dailey et al.* 12 Cush. 80; *Murphy v. Commonwealth*, 1 Met. (Ky.) 365; *Tyra v. Same*, 2 id. 1, which cases were misdemeanors, and expressly limit their application to misdemeanors only, and, therefore, cannot properly be cited as authority in cases of felony, and especially not in capital cases.

We therefore hold that the court erred in permitting the trial to proceed to a verdict after the withdrawal of one of the twelve jurors. The verdict of eleven jurymen in a capital case is a mere nullity, and any judgment rendered thereon against the defendant is without jurisdiction and void.

This conclusion renders it unnecessary for us to consider any of the other questions presented in the arguments of counsel.

The judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

## PEOPLE EX REL. BOARDMAN, appellants, v. CITY OF BUTTE, respondents.

CONSTITUTIONAL LAW — *Effect of submission of city charter to vote of the people.*— All the legislative powers of the territory are by the organic act vested in the territorial legislature. They cannot be delegated away or lawfully exercised by anybody else. Among these powers is that of creating municipal governments by charter, as auxiliaries in matter of local government. Such charters derive all their powers from legislative enactment, and none from the consent of those who are to live under them; but the legislature may make the consent of one, a few or many of those on whom the charter is to operate, the contingency upon which the charter shall take effect.

A submission to the resident tax-paying householders is competent, legal and proper — no one's constitutional rights are abridged thereby, and none have right to complain. Such limitation of the right to vote does not render void the act of incorporation.

*Appeal from Second District, Silver Bow County.*

S. DE WOLFE, for appellants.

The legislature of Montana territory, at its eleventh regular session in 1879, passed an act "Incorporating the town of Butte." Laws 1879, pp. 77, 88.

Section 2 of article 4 of said act provides as follows:

"All citizens of the United States, and those who have declared their intention to become such, of twenty-one years of age, who shall be tax-paying householders, and who shall have been actual residents of said city three months preceding said election, shall be entitled to vote for city officers, and the adoption of this charter; provided, that said voters shall give their votes in the wards in which they shall respectively reside."

Section 23 of article 7 provides for the submission of the charter to a vote of such qualified voters as are mentioned in section 2, article 4, for their acceptance or rejection, on the first Monday in April, 1879. And further provides that if a majority of the votes cast shall be in favor of the charter, "then this act to be in full force and effect; but if a majority of the votes cast shall be



against the charter, then this act shall remain suspended unless thereafter enforced as hereinafter set forth." Section 23, article 7.

Section 1, article 4, provides for an election to be held on the first Monday in May, 1879, for one mayor in said city, and two aldermen for each ward.

To the complaint or information, the defendants file a demurrer containing nine separate counts.

The first is a general demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.

This ground of demurrer will be considered later in connection with the complaint itself.

The second and third causes of demurrer are the same, the difference being in statement only, and the cause being that the action is wrongly brought in the name of the people, and not in the name of the district attorney.

The answer to this is the complaint itself. Code of Civil Procedure, ch. 5, sec. 398.

The fourth, fifth and sixth causes of demurrer are also substantially the same, and demur because Charles S. Warren is improperly made a party defendant. The complaint alleges that the defendant Warren was acting and assuming to act as a police magistrate in said town of Butte, under and by virtue of an election to that office by the persons claiming to be the city council of said town. That, as such police magistrate, he assumed and exercised the general powers and duties pertaining to an office of that kind in said town.

The general object of the action is to have the charter passed by the legislature incorporating the town of Butte declared invalid, because unauthorized, or in conflict with other and paramount law. But as the charter only assumed to create a corporation, and to confer upon it the usual powers of a municipal government, and left to the local government thus established the right of defining the jurisdiction and power of the different officers created

under it, and as Warren claimed to be an officer under said city government, and assumed and exercised judicial power thereunder, he was properly made a party defendant in an action to determine the validity of the city charter.

A corporation can only act through agents. And if there never was an incorporation of the town of Butte, as is contended in the present case, the persons who assumed the exercise of a franchise in the name of the corporation were rightly made defendants. Code, sec. 398; *State v. Taylor*, 25 Ohio St. 280; *State v. Coffee*, 59 Mo. 59; *State v. Cincinnati Gas Light Company*, 18 Ohio St. 262; *People v. Carpenter*, 24 N. Y. 86; *People v. Draper*, 15 N. Y. 532; *State v. Weatherby*, 45 Mo. 17; *Dillon on Mun. Corp.* sec. 719, note; *Angell & Ames on Corporations*, sec. 756.

In *The State v. Gas Light Co.*, *supra*, the court say: "In an action brought to determine whether a municipal corporation has been in fact created, it may be brought directly against the corporation, or against those who assume to exercise the franchises of a corporation. And the court assigns as a reason for the rule that it might be very inconvenient to make the entire body of corporators parties."

The same doctrine is virtually held in the case cited in 24 N. Y. 86, and by *Angell & Ames* in sec. 756.

This action is brought to test the validity or legality of the charter; and it is nowhere maintained that, if the charter is a law, but what the individual defendants named in the complaint rightfully hold and exercise the functions of the offices which they respectively fill. On the other hand, if the charter is not a law, the several individual defendants are guilty of usurpation of franchise, notwithstanding they may have acted in entire good faith. The judgment being, in the latter case, under sec. 404 of the code, that the several individual defendants be ousted from the office franchise or privilege so exer-

cised by them; that they pay the costs of the action, and be fined; at the discretion of the court, in a sum not exceeding \$5,000.

As against the assumed corporation, the only judgment that it would seem in the power of the court to render is the one prayed for in the complaint, that it be "excluded from all corporate rights, privileges and franchises."

There cannot be a question but what the several individual defendants were properly made such in this action, because the code expressly provides for this proceeding against them if they "usurp, intrude into, or unlawfully hold or exercise, any public office or franchise within his district in the territory." The only doubt that can arise is as to the correctness of making the city of Butte a defendant, while denying that it has, or ever had, a corporate existence.

The defendants have not demurred to the complaint because of the joinder of the city of Butte, but because of the joinder of the other defendants named in the complaint. If it was error, therefore, to make the city a party defendant, it has been waived by a failure to demur on its part. A defendant properly joined cannot demur to the complaint for the misjoinder of another defendant. If a complaint state a cause of action against one or some of several defendants, a joint demurrer cannot be sustained. *People v. Mayor et al.* 28 Barb. 240; *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *Ashby v. Winston*, 26 Mo. 210; *Richnuger v. Richnuger*, 50 Barb. 55; *R. R. Co. v. Schuyler*, 17 N. Y. 592; *Pinckney v. Wallace*, 1 Abb. Pr. 82.

\*In *The Territory v. Virginia Road Co.* 2 Mon. 96, it was strenuously insisted on the part of the defendant, that, as the complaint denied the existence of the corporation, the action, instead of being brought against the corporation by name, should have been against the persons who assumed to exercise powers in its name. But



the court, upon a full review of the authorities, which it there refers to, decides that the action was properly instituted against the corporation by name. The only difference between that case and the present is, that in the former it is conceded that the defendant once had a corporate existence, while in this it is denied.

The seventh and eighth causes of demurrer are likewise the same in substance, and allege that the several defendants mentioned in the complaint as composing the city council of Butte are improperly joined as defendants. The reasons and authorities cited in reference to the defendant Warren are likewise applicable to these other defendants.

The ninth ground of demurrer is that the complaint is ambiguous and uncertain. First, because it alleges that the act of the legislature incorporating the city is valid. This is evidently a misapprehension on the part of the pleader, as the entire scope of the complaint is to deny the validity of the legislation. The complaint in words declares that the various acts done by the defendants, and which are recited in the complaint, were done "without right, warrant, charter, or authority in law." This is the allegation of a conclusion of law only, and as such was unnecessary, but it certainly amounts to a denial of the validity of the act incorporating the city.

The second ground of ambiguity and uncertainty alleged is that the complaint does not aver that the act is in violation of the constitution of the United States or the organic act of the territory, or that it is not a rightful subject of legislation. If these were proper grounds of demurrer they would come under the first head, that the complaint does not state facts sufficient to constitute a cause of action. But they are at best only conclusions of law which follow the allegations which the complaint does contain, and whether made expressly or not, the court will determine from the allegations that are made, whether such conclusions result, and will render judgment accordingly.

The tenth and last ground of demurrer is that the court has not jurisdiction to annul the charter or set aside the act of the legislature creating the corporation. If by "annulling the charter," or "setting aside the act of the legislature," is meant that the court had not the jurisdiction to declare the act in question invalid as being in conflict with some higher and paramount law (if such was the judgment of the court), I deny wholly the position assumed as law in this branch of the demurrer.

Beyond this it will not be contended that the court, any more than an individual, can go.

It would seem unnecessary at this day to cite authority to show that a court of general jurisdiction — such as the district courts of a territory possess — have the authority to declare a legislative act unconstitutional, if such is the opinion of the court. It not only has the authority to do so, but it is inseparable from the exercise of judicial power. The oath which every judge takes before he enters upon the duties of his office, compels him to declare a legislative act void if it conflicts with the constitution or any higher and paramount law.

In *Marbury v. Madison*, the supreme court of the United States, speaking through Chief Justice Marshall, the greatest of all constitutional expounders, declares that:

"A legislative act repugnant to the constitution cannot become the law of the land, and it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict, the courts must decide on the operation of each. So if a law be in opposition to the constitution. If both the law and constitution apply to a particular case, the court must either decide the case conformably to the law, disregarding the constitution, or conformably with the constitution, disregarding the law. The court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty.*"

The rule thus clearly laid down has been many times repeated, and by many courts of the highest authority. And the principle is too firmly established both by reason and authority to be now questioned.

Returning to the first ground of demurrer, does the complaint state facts sufficient to constitute a cause of action?

In deciding this, the entire complaint must be considered, and the principle is well established that the demurrer admits all the allegations of the complaint that are issuable and well pleaded. 8 Cal. 392; 24 Cal. 602; 22 N. Y. 472.

The complaint alleges, and the demurrer confesses, the following facts:

1st. That the charter of Butte was submitted to a vote of the tax-paying householders of said town at the time alleged, and was by them accepted by a vote of seventy-two in favor of, and fifty against, the acceptance of said charter.

2d. That the defendants named in the complaint as the mayor and common council of said city were elected by a vote of the tax-paying householders of said city at the time alleged.

3d. That at the time said elections were held, there were a large number of persons residents of said town of Butte, male citizens of the United States, above the age of twenty-one years, and qualified voters under the general law of the territory, but who were disqualified from voting upon the question of the acceptance of said charter and the officers of said city government because they were not tax-paying householders.

4th. That, in pursuance of the elections so held, a town or municipal government has been established over said town and its inhabitants; and that the persons named in said complaint as composing the city council have since exercised the powers conferred or attempted to be conferred upon them by the charter passed by the legislature for the incorporation of said town.



5th. The enactment by said city council of the ordinances mentioned in the complaint.

6th. The election or appointment of Charles S. Warren as police magistrate by said city council, and the exercise by him of the powers of such magistrate within said town, and pursuant to the ordinances enacted by said city council.

7th. The arrest and fine of the several relators named, for the alleged violation by them of ordinance number 10, enacted by said city council.

These facts being admitted, the demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, becomes in effect a demurrer to the evidence, and it was upon this theory that the cause was tried and decided in the district court, the court below sustaining the demurrer generally, and not upon any of the specific grounds alleged.

The question thus presented by this appeal and record is one of law only, and it is whether the acts of the defendants (the respondents in this court) find warrant and authority in the act of the legislature approved February 21, 1879, incorporating the town of Butte. In other words, whether this act of the legislature is or is not a valid law.

On the part of the appellants it is maintained that the law is invalid. First, because the charter was never lawfully submitted for the acceptance or rejection of the incorporators named in the act.

Section 1 of article 1 of the act constitutes the "inhabitants of the city of Butte a body politic and corporate." The language is general, and embraces all the "inhabitants" of said town. But when the act comes to submit the charter to a vote of those who are thus created a body corporate, it singles out a particular class and submits to their vote only the decision of the question as to whether they will accept and live under the charter passed for their government. Charter, art. IV, sec. 2;

art. VII, sec. 23. This, it is maintained, was an unprecedented and unauthorized mode of submitting a charter for acceptance or rejection.

The authorities are nearly or quite unanimous in holding that legislatures have the power to create municipal corporations and erect town governments over the inhabitants thereof, without submitting the question to the determination of the inhabitants who live under the government thus established; yet the submission of the question is often left to a vote of the inhabitants. And such submission has not been regarded as a delegation of legislative power, which, under our system of government, is intrusted exclusively to the legislature, but a question merely as to the acceptance or rejection of a charter. 1 Dillon on Mun. Corp. sec. 23; Cooley on Const. Lim. p. 118, note 2, and cases; 26 N. Y. 472.

The charter may, in the first instance, embody the legislative will like any other law, but its taking effect as a law is made to depend on a vote of the inhabitants. In all the cases that have been found in which public or municipal charters have been submitted for the acceptance of the people who are to live under them, the words "citizens," "inhabitants," "corporators" or "voters" are used, and these words, in a political sense, under our form of government, all mean the same thing. 1 Dillon, sec. 23, note. Webster, Worcester, Bouvier and Burrill all define citizen, in a political sense, as one entitled to vote.

Chief Justice Taney, in *Scott v. Sanford*, 19 How. 404, says: "The words people of the United States and citizens are synonymous terms, and mean the same thing."

Conceding to its fullest extent, therefore, the right of the legislature to submit a municipal charter to a vote of the people or electors for their acceptance or rejection, it does not follow that they have the authority to single out a particular class of voters or property holders and make their will, or the will of a majority of them, the rule by which to determine whether the charter shall take effect

or not. If the determination of the question can be submitted to a particular class, it can be submitted to individuals by name, or to a single individual, and thus present the strange, and in this land unheard of, spectacle of a government erected over a community at the will of a single individual.

The theory upon which charters are submitted to a vote of the people refutes the proposition that such governments shall take effect from the will of a class only.

The great weight of authority is that a legislature cannot submit a general law to a vote of the people so as to make its taking effect as a law depend upon the vote of a majority for or against it, and this on the well settled principle that the duty of enacting laws has been confided to the legislature, and this duty cannot be by them delegated to another. The case of *Barto v. Hemrod*, 8 N. Y. 483, and many later cases, abundantly establish this proposition. But the erection of municipal governments are not classed as general laws, and have been denominated auxiliary governments. Such governments being local, and auxiliary to the principal government under which they exist, the rule that the legislature has not the power to refer a general law to a vote of the people has been uniformly held as not applicable to the submission of town or city charters to a vote of the inhabitants living within the corporation. One, and no doubt the principal, reason, why such acts are regarded as exceptions to the rule that laws may not be submitted, is, that as the people of the municipality have to bear the burdens of the local government, and as the local legislation will affect them much more intimately than the mass of the people, they should have the right of deciding whether they want such a government or not.

No authority has been found, and no law in any state or territory, it is believed, exists, in which a charter for the government of a town or city has been submitted — if submitted at all — to a less number than the entire



body of qualified electors resident within the town or city. And the fact that writers on municipal law always speak of the submission of charters to the "people," "the inhabitants," "the voters," and other like terms, denoting that the submission was general, negatives the idea that it was ever partial, as in the present case. 1 Dillon on Mun. Corp. p. 23; Cooley's Const. Lim. p. 118.

Passing from the question of whether the charter was ever lawfully submitted to, and adopted by, the inhabitants of Butte, the second proposition which I make is, that the charter is illegal and unauthorized legislation, inasmuch as it attempts to deprive a portion of the inhabitants of said city, who are at the same time male citizens of the United States, and qualified voters under the general election law of the territory, from the right or privilege of voting under said charter and the government of said city. In this particular the charter enacted for Butte is exceptional legislation in Montana or elsewhere. Other charters have been enacted in this territory for the creation of town governments, but in all of them the entire body of voters, under the general law, living within the town were allowed to vote under the town government. This was the case in the charter passed for the government of Virginia City, and, more recently, of Helena.

The statute book in all the other territories is free from legislation of the kind, hence their reports are devoid of all adjudications on the subject.

We are forced to examine the question, therefore, in the light of reason rather than authority.

The first inquiry that presents itself in any consideration of the question of suffrage is, from whence is the right of privilege derived? What government confers, or can confer, or take it away?

No power is delegated by the constitution to the United States over the question, either to confer it upon, or withhold it from, any citizen of a state. The constitution

requires that the electors for members of the house of representatives in each state shall have the same qualifications requisite for electors of the most numerous branch of the state legislature; thus adopting the electors made by the state, and making them its own for the purpose of electing members of the house of representatives. The only other provision of the constitution directly relating to the subject is the fifteenth amendment, which is an inhibition upon the government of the United States and of the states against denying or abridging the right of citizens of the United States to vote on account of "race, color or previous condition of servitude." Aside from this restriction, all jurisdiction over the question within a state belongs to the state or people. McCreary, Law of Elections, p. 45 and cases; Story on Con. secs. 581, 582.

Within the states the qualifications requisite for suffrage are regulated in all cases by the constitution of the state, and the only authority which the legislature has, is to pass laws regulating the exercise of the right, and the regulations must be such as not to deprive of the right itself. McCreary, Law of Elections, p. 46, sec. 6; 58 Penn. 338; 60 Penn. 54; *Kennedy v. Wilmington*, 73 N. C. 198 (21 Am. Rep. 468); *Clayton v. Harris*, 7 Nev. 64; 12 Pick. 485; 39 N. Y. 429; Federalist, No. 52.

The rule being universal, that the qualifications of suffrage within the states are regulated by the different state constitutions, and not by the legislatures of the states, it follows that the *people*, in their primary capacity as the organizers and founders of government, or, in other and popular language, the people as sovereigns, as the source of political power, have reserved this question to themselves, and not delegated it to any government; constitutions being the embodiment of their will, having been ratified directly by their votes; the only restriction on the will and power of the people being the fifteenth amendment to the constitution, and that other

provision which guaranties to each state a republican form of government.

The constitutions of the states do not, however, solve the question in the territories. Here we have no constitution. The people as such do not possess sovereign power. In the theory and practice of the government of the United States, a territory is a region of country acquired by the United States, by cession or conquest, and which has not the requisite population for admission into the Union as a state, and over which, from necessity, the United States exercises control, and holds in trust for all citizens and others going there to live, until they are sufficient in number to be entitled to admission into the Union as a state. The power thus exercised has been sometimes attributed to that provision of the constitution which authorizes congress to make all needful rules and regulations respecting the territory or other property belonging to the United States, but the better opinion seems to be that it is an implied power growing out of the treaty-making power of the government. The right to govern being held as an incident of the power to acquire new territory.

Whatever the source of the power, it has been too long exercised to be now questioned, and the various acts of congress, and decisions of the supreme court of the United States in regard to them, furnishes the only rule by which the power which congress may exercise over the territories, or people resident therein, can be determined.

A single expression used by Chief Justice Marshall in the case of *The American & Ocean Insurance Co. v. Canter*, 1 Pet. 511, wherein (speaking of a territorial court of the then territory of Florida), he said, "In legislating for them congress exercises the combined powers of the general and of a state government," has been many times treated as conferring upon congress absolute and wholly discretionary powers over the territories.



But this expression and its context, as well as the facts in reference to which it was used, underwent thorough examination by the same court in the later case of *Scott v. Sanford*, 19 How. 445. And the court there held that the language referred only to the power of congress to establish courts within the territory, and to confer upon them such jurisdiction as it saw proper. That in doing this congress exercised the "combined power of the general and state government."

The case of *Scott v. Sanford* is in some respects the most memorable ever decided in the country. In its influence and effect upon the public mind and the politics of the country, it is without parallel.

The facts are too familiar to require any extended notice. Dred Scott was a negro slave, owned in Missouri, and whose master took him first to the military post at Rock Island, in the state of Illinois, and afterwards to Fort Snelling, in the territory of Upper Louisiana, and from there returned with him to the state of Missouri. Scott, after his return to Missouri, instituted suit in the circuit court of the United States to recover his freedom, on the ground that congress, by the act of 1820, commonly known as the Missouri compromise act, had prohibited slavery in all the territories of the United States lying north of the line of 36° 30'; and that his master had forfeited ownership over him by taking him into territory in which slavery was interdicted by act of congress. The principal questions involved in the case were: First, whether the plaintiff was a citizen of the United States, and as such entitled to sue in a court of the United States. Secondly, the constitutionality of the act of congress which prohibited the introduction of slavery into the territories north of 36° 30'. The decision of the court was adverse to the plaintiff on both grounds.

The case has become historical, and the bitter political and sectional feelings it awakened at the time have nearly or quite passed away. The fiat of war, crystal-

lized into a constitutional amendment, has given to Dred Scott and his descendants, for all time, that liberty which his suit failed to secure. And no doubt its failure contributed more successfully to that end, and to the emancipation of his race, than its success could have done.

More remarkable still will be the fact, if the decision of his cause shall in the end be the means of promoting and establishing the rights and privileges of that race which enslaved his own. In his case, speaking of the powers of congress over the territories, the court says, on p. 447:

“The power to expand the territory of the United States by the admission of new states is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a state, and not to be held as a colony, and governed by congress with absolute authority. As the propriety of admitting a new state is committed to the sound discretion of congress, the power to acquire territory for that purpose must rest upon the same discretion; and as there is no express regulation in the constitution defining the power which the general government may exercise over the person or property of a citizen in the territory thus acquired, the court must necessarily look to the provisions and principles of the constitution, and its distribution of powers, for the rules and principles by which its decision must be governed. Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the general government, and to be governed by any laws it may think proper to impose. . . . A power in the general government to obtain and hold colonies, and dependent territories, over which

they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the United States in the exercise of the powers granted them."

Further on, on page 449, the court says:

"The power of congress over the person or property of a citizen can never be a mere discretionary power under our constitution and form of government. The forms of the government and the rights and privileges of the citizens are regulated and plainly defined by the constitution itself. And when the territory becomes a part of the United States the federal government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizens strictly defined and limited by the constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the constitution had denied it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the constitution.

"The territory being a part of the United States, the government and the citizens both enter it under the authority of the constitution, with their respective rights defined and marked out; and the federal government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved." 2 Dal. 304; 1 Nat. Digest, 525. 20, 21.

Reasoning like this amounts to demonstration. Noth-



ing can add to its force, or do away with its conclusiveness. Let it be remembered, too, that the language was used in reference to slavery and the power of congress to prohibit its introduction in the territories — an institution which did not exist in more than one-half the states, and which was reprobated by a vast majority of the people of the United States.

How much more powerful and convincing does the language of the court become when applied to the preservation of a right which all recognize, than to the perpetuation and extension of a wrong which the great majority condemn!

In the light of this opinion will it be urged, or can it be maintained, that while congress has no power to deprive any citizen of the United States of the right of taking and holding in a territory property in slaves, they yet have the power to deny to citizens the right to vote on matters of local concern? and to draw distinctions between citizens based on the possession of a particular kind of property? If so, from what article or section of the constitution is the power derived? I have already shown that the constitution delegates no authority whatever to the general government over the question of suffrage within a state, and the decision in the Dred Scott case, from which I have quoted, shows that congress cannot govern arbitrarily, or at its discretion merely, the people of a territory. The language of the court is, "that the federal government can exercise no power over his person or property beyond what that instrument (the constitution) confers, nor lawfully deny any right which it has reserved."

The case of *Miner v. Happusett*, 21 Wall. 162, lays down clearly the doctrine that the general government has no control over the question of suffrage within a state, and that the right of voting was not one of the privileges or immunities which the fourteenth amendment to the constitution was intended to guard and

protect. And at another place declares that "the constitution of the United States has not conferred the right of suffrage upon any one. And the United States have no voters of their own." The tenth amendment to the constitution declares that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. If this provision be considered in connection with the decision in *Miner* against *Happusett* and with the language of the court, last quoted, in the *Dred Scott* case, the conclusion is irresistible that the general government have no power to confer suffrage upon any one within a state, nor power to deny it to any one in a territory who is a citizen of the United States and of proper age to exercise the right; but that the right within a territory is one which, by the tenth amendment, is "reserved by the people."

The constitution has always been remarked for the accuracy and felicity of its language, and unless there were rights which the people possessed, and which they had not conferred upon any government, why in this amendment use the language it does when it says "reserved to the states respectively, *or to the people?*"

If the proposition be true, that congress cannot deny to a citizen in a territory the right to vote, my next proposition is one that results from it, and is this: that congress cannot create a government within a territory with greater power than congress itself possesses; or, speaking exactly, if congress cannot deny this right to a citizen, it cannot confer power on the territorial legislature to do so.

The government erected over a territory is one proceeding entirely from congress and not from the people of the territory. Of the three co-ordinate branches of which a territorial government is composed, two—the executive and judicial—are composed of persons appointed directly by the United States, in the selection of

whom the people of the territory have neither voice nor consideration. For the most part the appointees to these offices have never lived in the territory, and their nomination to office by the president usually designates them as citizens of some other state. The appointees, and the mode of appointment, resemble more those sent by the government of Great Britain to rule over her remote dependencies than they do officers chosen within a state by the voice of the people.

The remaining branch — the legislature — are chosen by the people; but they also are subject to the power that created them. Congress regulates the length and frequency of their sessions, pays their *per diem*, publishes or fails to publish their laws; and, lastly, reserves the right to nullify their enactments if it does not approve them.

To call such a system a government at all is something of a travesty on the name of government, but to call it a government of the people is wider still of the mark. Sometimes these organic acts are spoken of as the constitution of a territory. This is a greater solecism than to call the government under it a government of the people. A constitution, as understood in our country, is paramount and fundamental law, emanating from the people themselves, defining and limiting the powers of the government which it creates. Coming from the people, and embodying their will, no other power can amend or supersede a constitution which they have once created. To call an act of congress a constitution leads only to confusion. Congress itself is but a legislative body, enacting laws in obedience to a constitution, and with no power in the instrument which creates it, to enact constitutions for the territories or any other region. The laws they pass establishing governments within a territory have the same and no greater force than any other of their enactments. They must be subject to the constitution. They are at all times liable to repeal or amendment. If



they conflict with a later enactment they must give way. The rules of construction which apply to all laws apply also to them. And finally, they cease to exist without being repealed, whenever the people are invested with the right of local government. In this particular these laws have less dignity than others which congress are authorized to enact. In view of their nature, it is a perversion of terms to liken them to constitutions. Constitutions are uniformly preceded by a preamble reciting in substance, and generally in exact words: "We, the people, do ordain and establish the constitution." Mr. Webster, in one of his great constitutional arguments in the senate of the United States, attached great importance to the preamble of the constitution of the United States on this account, as showing that it was created by the people and not by the states, and this is now the accepted doctrine by all parties and sections.

The question as to the nature and power of territorial governments came before this court as far back as 1874, in the case of *The Territory v. Lee*, in which his honor, the present chief justice, rendered the decision, in which, with a conclusiveness and force of reason which I cannot hope to imitate, demonstrated the proposition I have here sought to establish. 2 Mont. 132.

By the fifth section of the organic act congress has conferred, or attempted to confer, upon the legislative assembly the power to fix the qualifications of voting and holding office at all elections after the first. The legislature, at the ninth session, passed an act regulating elections, the first section of which provides, "that all male Citizens of the United States, above the age of twenty-one years, and all persons of the same age who shall have declared their intention of becoming citizens, and who under the existing laws of the United States may ultimately become citizens thereof, shall be deemed electors of this territory, and be entitled to vote for delegate to congress and for territorial, district, county and pre-

cinct officers, provided they shall have resided in the territory three months, and in the county where they may offer to vote thirty days preceding the day of election."

This act conferred the right of suffrage upon the same class that congress at first conferred it by the section of the organic act mentioned. And the act is substantially the same as the constitutions of nearly all the states. And if there is such a thing as common American law resulting from unanimity throughout the country, this act was the reaffirmation of it. Minors and females were excluded from voting because they are excluded almost everywhere else. No property qualification was established, because these have been elsewhere abolished, though they at one time existed in most of the older states. A brief residence in a fixed locality was required, as an evidence that the elector was not a mere transient person passing through the territory.

This general law was in force throughout the territory when the charter of Butte was passed; and in addition to the reasons already urged against the latter act, it is subject to the further objection that it is partial and unequal legislation, and for this reason should be declared void. Can any reason be given why a citizen of the United States, resident in the town of Butte, should not have the same political rights and privileges as a citizen of the United States residing in Virginia City or Helena? Yet the legislature has accorded to all electors, made such by the general law referred to, the right of voting under the municipal governments erected over them, but have limited the right in Butte to a special property class. Mr. Justice Curtis, in his opinion rendered in the Dred Scott case, speaking of the right to vote, says: "There can be no doubt that the right to vote is one of the chiefest attributes of citizenship under the American constitutions, and the possession of this right is decisive evidence of citizenship."

All standard lexicographers, as has already been seen, speak of voting as one of the rights pertaining to citizenship. To deprive of the right is, then, to lessen the value of citizenship; and this of itself becomes partial and unequal legislation.

John Locke — a memorable name, and a benefactor of his race — more than a hundred years ago said of those who make laws: “They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.”

Mr. Cooley, in his able work on constitutional limitations, quoting with approval the above passage from Locke, adds: “And this may be justly said to have become a maxim in the law, by which may be tested the authority and binding force of legislative enactments.” Pages 392, 393.

Judged by this standard alone, this law cannot stand, without conceding that it would have been valid had it been general instead of being local and partial.

Another principle intimately connected with this, which is inwoven into all American ideas of government — which forms, indeed, the basis on which American governments are founded, — is that of perfect equality of rights and privileges. Whether voting be an absolute right or not, it certainly is a political privilege. The fifteenth amendment to the constitution calls it a “right,” and it cannot be forgotten what scrupulous consideration was given to the phraseology of the recent amendments before they were finally submitted by congress to the states for ratification. The constitutions of all the states contain a bill of rights in which this equality of rights or privileges is securely guarded by fundamental law; but were it omitted, it is equally part of the American idea of government. The force, as well as universal prevalence of this thought, was illustrated in the case of the organization of the government of California. The dis-



covery of gold attracted there suddenly a large immigration. There was neither constitution nor law in existence. The Mexican law and authorities had been displaced, and congress had substituted nothing in its stead. What the people did, under the circumstances, was to put in practice the American ideas of government which they took with them to the country. They elected delegates to a convention to frame a constitution of government, and in this election all citizens of the United States, upwards of twenty-one years of age, took part. After the constitution had been framed, in accordance with other American precedents, it was submitted for the acceptance of the same class that called the convention into being, and was by them ratified. It was done spontaneously, and without any law or authority except such as was inherent in American citizens, and in the exigency of their situation. A colony of Englishmen, under the same circumstances, would doubtless have waited for a royal charter before taking action, and in the mean time have remained in a state of anarchy; such being the different theories of the two peoples in regard to their rights and the source of sovereign power.

The government of the United States has clearly defined its position on the question of suffrage in this and other territories by conferring it in the first instance upon all its citizens of the age of twenty-one years and on all who have declared their intention to become citizens. If more were wanting, as evincing the theory and policy of the government in this respect, it is found in the fifteenth amendment and in section 2004 of the revised laws of the United States, which enacts that, "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude,

any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding."

This statute was enacted in order to carry out the provisions of the fifteenth amendment, and certainly if a statute can be framed which is full and sweeping in its application, this one is so.

Upon reason it might be urged that the failure to own a particular kind of property should not be a cause of political disability any more than to be born black or any other color.

It is a rule of construction in all statutes which affect personal rights or personal liberty, that the one should be adopted which will preserve and not destroy those rights whenever this can be done. Applying this rule to the fifth section of the organic act (if we take into consideration the other legislation of congress which has been referred to), we are not left in doubt about the power which congress intended when it conferred upon the legislative assembly the power of prescribing the qualifications of voting and holding office at all elections after the first. The power intended was that of regulation and not of destruction — the power to establish rules for the exercise of a right, and not to take away the right itself. Otherwise the legislative assembly is omnipotent. It can disfranchise at pleasure, and confer upon or withhold the right of voting from any part of the people. If it can say that only tax-paying householders shall vote within a town government which it creates, it can equally say that only the owners of ranches shall have the right of voting for county officers, and only merchants and bankers for members of the legislature. They can go further than this, even, and limit suffrage to themselves alone, and thus secure to themselves permanence in office, and relieve all others from the cares and burdens of state. If they can create one, they can create as many separate little oligarchies as there are towns in the territory. And in

this way they can destroy republican government in a territory by the creation of a special property and governing class. To assume power like this for a territorial legislature is to assume too much, and the illustrations given show the fallacy of any arguments based on such an assumption. If it be true, as the supreme court say in *Scott v. Sanford*, that the government of the United States holds the territory in trust for the people of the United States, and that the United States cannot confer any rights or privileges on one class of citizens which it denies to another, by what possible power can a territorial government — the agent of the government and not of the people, as I have already shown — confer special privileges on one class which it withholds from another? To maintain a doctrine like this is to maintain that the power of the agent is greater than that of the principal.

If it be asked what the limit is to legislative power in this respect in a territory, I answer that the constitution and laws of the United States, the decisions of the supreme court under them, and the nature and genius of our institutions, prescribe a limit. The nature of legislative powers and duties prescribe a limit. Without express authority and from an authorized source, they cannot legislate to destroy political rights which already exist, any more than they would be authorized to take private property for public use without due process of law. On this subject of legislative power the supreme court of the United States says:

“I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine



the nature and terms of the social compact, and as *they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and end of legislative power will limit the exercise of it.* . . . . *There are acts which the federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative power. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligations of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded."* *Calder v. Bull*, 3 Dall. 270.

How exactly does this language apply to the law now in question, and with what certainty does it pronounce its condemnation. Mark the language of the court. It speaks not only of the compact of government, the constitution which makes us a nation, but of "vital principles in our free and republican governments." This may be called vague and general language. It may be said to be a "glittering generality." The character of the tribunal which used the language negatives any criticism implying that what they say is said for popular effect, or otherwise, except as its matured judgment in the enunciation of legal principles. Suppose within a state the constitution was silent on the question of suffrage, and contained no prohibition upon legislative power, does any one suppose that the legislature could then disfranchise any class of voters? If they could, they are mightier than the voters who made them legislators. The state of Rhode Island, up to the year 1842, existed under the charter granted them by Charles II in 1663. This charter conferred the right of suffrage only on persons possessed of a freehold estate, and, being a grant from the crown, did

not provide for any change or amendment, as it could not. The people of the state had oftentimes petitioned the legislature to pass an act authorizing the people of the state to elect delegates to a convention to frame a constitution to be submitted to a vote of the people, and which, if ratified, should supersede the charter. But the legislature, composed as it was of the privileged class, disregarded these petitions, and the people finally took action themselves, elected delegates to a convention which framed a constitution, under which they proceeded to ratify and elect officers. This new constitution did away with the objectionable feature in the old charter, and conferred the right of voting on all citizens of the proper age. Although this act of the people was held by the courts of the state to be revolutionary, and the constitution thus framed did not take effect, it yet led the legislature of the state to act, and a constitution was framed in conformity with an act passed for the purpose, which was approved by the people and superseded the old charter.

The matter came near leading to a revolution within the state, and it all grew out of the denial of suffrage to its citizens. *Wilkinson v. Leland*, 2 Pet. 656; *Luther v. Borden*, 7 How. 34.

The case of *Tungman v. Chicago*, 78 Ill. 405, illustrates the principle that the legislative power is not supreme or unlimited, although they may violate no constitutional provision. The legislature of Illinois undertook to establish a board of health for that city, to be composed of a number of physicians to be selected and appointed by the members of the superior court; the board of health so appointed to have the power to enact ordinances for the preservation of the health of the inhabitants of the city. The validity of this act was questioned and the supreme court of Illinois decided it to be invalid, on the ground that it deprived the people of the city of self-government, and that the act was repugnant to our

theory of government. In principle that case did not differ from the present. In one the judges of the superior court selected the persons who were to frame the ordinance; here the tax-paying householders select them. In both the people are deprived of the right of self-government. It matters not that the elective body may have been larger in one case than in the other. So long as a class of citizens, or a single citizen, without cause, is deprived of the right of voting, it is a violation of the right of local self-government.

The validity or invalidity of a legislative act cannot depend upon the number of persons whose rights it violates. The body of the people hold their privileges by no other or different tenure from that by which each individual comprising the body holds his. An act which violates the rights of ten men cannot be justified because it does not violate the rights of a hundred.

In deciding a question as important as the present, the court will take into consideration the spirit and intention of the legislature as well as the letter of the act, and if, from this, the court is of opinion that congress, by the fifth section of the organic act, intended to confer upon the legislative assembly the power to prescribe regulations for the exercise of the right of suffrage, and not the power to take away the right from a large class of citizens, upon this view, the court will declare this charter invalid. And in determining this point the court will look not only at the law itself, but will also take into view contemporaneous as well as subsequent legislation on the same subject. The organic act of the territory was passed by congress in 1864. At that time there had been little agitation and no very great interest felt about suffrage as a matter of national concern. But that interest became more important than all others immediately after the close of the war. In the opinion of the then dominant party, the freedmen of the south, then newly emancipated, if left under the absolute control and



government of the white race, would be subjected to a fate nearly or quite as hard as they had endured while in a state of slavery. To prevent this, and in order to give to the freedmen the means of protecting themselves against oppressive legislation, the fourteenth and fifteenth amendments were passed.

The right of voting has been termed, not inaptly, "the right preservative of rights." And it was upon this theory that the people of the country acted when they passed the fifteenth amendment to the constitution. Without this amendment, it was thought that the liberty which had just been conferred might prove an empty boon. If voting, then, is a means of preserving rights, the deprivation of the right to vote is equivalent to deprivation of rights themselves.

Shylock, with unerring truth and logic, said:

"You take my house when you do take the prop  
That doth sustain my house: You take my life  
When you do take the means whereby I live."

Then, again, section 2004 of the Revised Statutes, already referred to, shows conclusively that, as far as the government of the United States is concerned, its policy is to do away with all distinctions between its citizens and confer equal rights and privileges on all. If we turn from the United States to the state governments and the legislation of other territories, we find that here also, without exception, there has been of late years an enlargement and nowhere an abridgment of the right of suffrage. At the time of the adoption of the constitution of the United States, most of the constitutions of the original states required property qualifications of some kind as a condition of voting. In nearly, if not all, these constitutions have been amended in conformity with the more modern idea that ours is a government of men and not of property. The state of Massachusetts—certainly not behind any of her sisters in enlightenment and advanced thought—by an act of one branch of her legisla-

ture recently proposed a further enlargement of the liberty of her citizens by conferring the right to vote on females. And this has actually been some time done in the neighboring territories of Utah and Wyoming.

Of all the states and territories, Montana only has gone backward, and here only, as has been said, in a single act, and within a particular locality. I do not refer to legislation elsewhere as any direct authority here, but as showing the tendency and drift of public opinion elsewhere on this question. It might not, however, be inappropriately urged, in view of the fact that, as the government of the United States has declared, by its highest judicial tribunal, that the territory of the United States is held by it in trust for the benefit of all its citizens, that it is incompetent for a part of those citizens to deprive others of rights which a portion enjoy, the effect of which would be to subject a region large enough for an empire to the control of a class, and thereby prevent the settlement of a territory. It requires no argument to prove that the deprivation of the right to vote would of itself deter many citizens from going into either a state or territory to locate, and the policy of the government is to promote and not retard the settlement of the territories.

In another sense the act in question should be held void. Our government has for its foundation the respect and attachment of its citizens. These constitute at once its strength and value. Deprive the citizen of the right of voting, and you weaken, if you do not destroy, his attachment for our institutions and laws, and to that extent you weaken and impair the government itself. This branch of the subject suggests and tempts to a discussion which time will not permit of.

Speaking on the subject of local government by the people, De Tocqueville, in his great work, "Democracy in America," says:

"Local assembly of citizens constitutes the strength of

free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach, and teach men how to use and how to enjoy it. A nation may establish the system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty."

See, also, remarks of Ruffin, J., in 4 Jones' (N. C.) Eq. 323, cited by Cooley in his work on Municipal Corporations, p. 82, note 3; *id.* p. 89.

It was strenuously urged in the court below that this charter should be sustained because of the influx of vicious persons and criminals within the territory. This might be a reason for the enactment of more stringent laws against crime, but not for sustaining this charter.

The vice of the argument is that it confounds crime with honest poverty, and punishes a man for not owning a house just as it would if he had committed and been convicted of crime. It adds insult to wrong, and heaps humiliation on misfortune.

No plea of necessity can be successfully urged in support of a law that violates personal rights or fundamental principles. And the greatest necessity at all times exists why such enactments should be declared void. Where courts do this, and leave to other departments the correction of public ills, they will have performed their whole duty.

Briefly to recapitulate the points on which I rely for the reversal of the judgment of the district court, I maintain:

*First.* That the charter of Butte was never submitted to a vote of the corporators or qualified voters residing in said town, and has never been accepted by them.

*Second.* That congress has no authority, under the constitution of the United States, to deprive any male citizen of the United States, of suitable age, of the right of voting at any election held within one of the territories of the United States, unless it be in punishment for crime.



*Third.* That a territorial government is a government erected by congress over a territory, and derives none of its powers from the people. That congress cannot confer on such a government greater powers than itself possesses.

*Fourth.* That the right of voting is the highest attribute of a citizen, and is the act by which the sovereign power of the people is manifested. That no power exists under our form of government to deprive any citizen of this right, until the people themselves deny or abridge the right through a constitution adopted by themselves. That this power of the people is limited by the constitution adopted by the United States to this extent,—that they can establish no government that is not republican in form.

*Fifth.* That in the absence of constitutional or other restraints on legislative power, such power is limited by the nature of free government, and the fundamental principles of liberty on which it rests. These, and the nature and end of legislative power, furnish a limit to the exercise of it. That the act in question is in violation of those free principles, and for this reason was beyond legislative power.

*Sixth.* That the charter passed by the legislature for the town of Butte is partial and unequal legislation, inasmuch as it deprives a portion of the citizens of said town of the same privileges which it accords to others, of voting for officers of the town government.

*Seventh.* Said act is further partial and unequal in this — that it establishes a different standard of voting in said town from what exists in any other towns, or elsewhere in the territory.

*Eighth.* Said act is anti-republican in character, and erects an oligarchy within the limits of said town and over the inhabitants thereof.

WADE, C. J. The act incorporating the city of Butte provides, article IV, section 2 (Session Laws, 1879).

as follows: "All citizens of the United States, and those who have declared their intention to become such, of twenty-one years of age, who shall be tax-paying householders, and who shall have been actual residents of said city three months preceding said election, shall be entitled to vote for city officers and the adoption of this charter."

The validity of this act of incorporation is called in question principally for the reason that it limits and restricts the right to vote upon the proposition to adopt or to reject the charter to the tax-paying householders who shall have been actual residents of the city for three months preceding the election.

1. The organic act vests all legislative power of the territory in the governor and legislative assembly. The qualifications of voters and of officers (after the first election) are such as shall be prescribed by the legislature. The legislative power of the territory extends to all rightful subjects of legislation consistent with the constitution and the organic act of the territory. The power to make laws, limited only by the boundaries of the constitution and the organic act, resides with the legislature, and there it must remain. But it is no violation of the principle that the legislature may confer upon municipal organization certain powers of legislation concerning local regulation, for such municipal governments are mere auxiliaries to the state government in the business of municipal rule.

It is another well-settled principle that the legislature may create municipal organizations and governments upon its own motion, consulting only its own views as to the propriety or necessity of such action, and without the consent and against the protest of those upon whom such government is to take effect. Cooley's Const. Lim. 143.

The theory of a government by the people is that they act through their representatives. They delegate their

authority to their agents, who speak and act for them in making laws. The act of an agent, within the scope of his authority, binds the principal. Hence, laws enacted by a properly constituted legislature, within the scope of its authority, and not in conflict with the constitution or organic law, bind the people. They give their consent to laws by clothing their agents with power and authority to make them. There is no reserved power in the people to consent to or reject laws properly enacted by their lawfully constituted agents. If they object to the laws for the reason that they are not within the limits of the organic law, they may have that question determined in the proper tribunals; if they object to them because they are oppressive, or do not fulfil their expectations, they may elect new agents to alter or abolish them, and to enact others in their places.

It is within the competency of a territorial legislature to create municipal corporations. Its authority extends to all rightful subjects of legislation. It may provide municipal courts, although by the organic act it is declared that the judicial power of the territory shall be vested in a supreme court, district courts, probate courts and justices of the peace. 1 Dillon on Mun. Corp. sec. 18, citing *State v. Young*, 3 Kans. 445; *Barnes v. Atchison*, 2 id. 454; *Reddick v. Aurelia*, 1 Mo. 5; *Vincennes University v. Indiana*, 14 How. 268; *Vance v. Bank*, 1 Blackf. 80; *Myers v. Bank*, 20 Ohio, 283; *Deitz v. City*, 1 Cal. 323.

The same author further says: "The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is assented to or accepted by the corporators, has no application to statutes creating municipal corporations. These are imperative and binding without any consent, unless the act is expressly made conditional. All who live within the limits of the incorporated district are bound by them, and can only withdraw from the corporation by



removal. Over such corporations the legislature, unless restrained by the constitution, has entire control; and, unless otherwise provided by the act itself, or a different intention is manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect. 1 Dillon on Mun. Corp. sec. 23; *Medical Institute v. Patterson*, 1 Denio, 61; 5 id. 681; *Myers v. Irwin*, 3 Serg. & R. 368; Angell & Ames, sec. 79, and cases cited; *Wells v. Burbank*, 17 N. H. 393; *Society, etc. v. Town of Paulet*, 4 Pet. 480.

Having this authority, it has been doubted whether the legislature had the lawful right to submit the question of the adoption or rejection of a municipal charter to the people for whom it was created; but the weight of authority is, and the practice is now general, to submit to those interested, and who are to take upon themselves the burdens imposed by a municipal government, if the same is established, the question as to the adoption or rejection of the charter. And this is not the delegation of legislative authority to the people. It is merely attaching a condition to the law and providing that it shall take effect upon the happening of a certain event. 1 Dillon's Mun. Corp. sec. 23.

The legislature having absolute authority to establish a municipal government for a town or city without consulting the people of such town or city, or obtaining their consent, it follows that the legislature may cause the establishing of such municipal government to depend upon the happening of any future contingency or event.

It is objected that this act of incorporation did not become a law by virtue of the will of the legislature, but by virtue of the will of the people to whom the question of its adoption was submitted. This objection is not supported by authority. The legislature may attach such conditions as to the taking effect of laws as it sees proper.

In the case of *Slack v. The M. & L. Railroad Co.*

13 B. Mon. 23, the court says: "It is not essential to the character and force of a law that the legislative enactment should itself command to be done everything for which it provides. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act done under authority conferred by the legislature is precisely as legal and valid as if done in obedience to a legislative command. Each is entitled to the same force and efficacy, and each must be followed by all the consequences which, either by the general law or by the particular statute, are annexed to the particular law, because such is done in effectuation of the legislative will, and each, when done according to that will, has all the sanction which the legislative power can give. Each is, therefore, entitled to the aid of the whole power of the government to uphold it, and to maintain the rights flowing from it. A peremptory statute is at once mandatory and requires obedience, and thus is at once a perfect law in all respects. A statute giving authority to do or not to do, and presenting the consequences of the act done, has not, until the act is done, any mandatory effect requiring immediate obedience, except so far as it regulates the time and manner of doing the act, and expressly or impliedly commands that the agent shall not be prevented from doing it according to the discretion allowed. Beyond that it has not a mandatory effect till the act is done, and is not, until then, a perfect law as to all the purposes provided for. In other words, it does not take its final effect as a mandatory law until the discretionary act is done, upon which it is to have its final and peremptory operation. So far as such a statute confers authority and discretion, it is as obligatory from the first as the legislative power can make it. And although its further practical efficacy may depend upon the discretionary act of some other body or individual, it is not derived from that discretion,

but from the will of the legislature which authorized the act and prescribed its consequences."

In *Burr v. Blanding*, 14 Cal. 357, the court says: "Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the legislature may impose. They may take effect only upon the happening of events which are in the future and uncertain; and among others, the voluntary act of the parties upon whom they are designed to operate. They are no less complete and perfect, when passed by the legislature, though future and contingent events may determine whether or not they shall take effect."

In *Smith v. The City of Janesville*, 26 Wis. 294, the court says: "No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute or conditional and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain."

In *Mores v. The City of Reading*, 21 Pa. St. 202, the court says: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons, to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law."

In *C. W. & Z. R. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 88, the court said: "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of law. The first cannot be done; to the latter, no valid objection can be made."

In *Hobert v. Sup'rs, etc.* 17 Cal. 31, the supreme court of California says: "The general principle is unquestionably



true, that our system is not a pure democracy, but a representative republican government, one of whose departments—the legislative—has the exclusive faculty of enacting laws. But the legislative department, representing the mass of political powers, is no further controlled as to its powers, or the mode of their exercise, than by the restrictions of the constitution. Such restrictions must be shown, before the action of the legislature, as to fact or mode, can be held invalid. Accordingly, the legislature, having this general power of enacting laws, may enact them in its own form, where not restrained, and may give to them such effect, to be worked out in such a way and by such means as it chooses to prescribe. It may provide that a law shall go into effect at one time or another, absolutely or on condition, upon certain terms or in a certain event, or without regard to future events.”

Says the supreme court of Pennsylvania in *Locke's Appeal*, 72 Pa. St. 498, by Agnew, J.: “The true distinction I consider to be this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.

“There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation. Hence the necessity of municipal divisions of states into counties, townships, cities, wards, boroughs and districts, to which is committed the power of determining many matters necessary or merely useful to local welfare. Can any one distinguish between committing the determining power to the *authorities* of the district and to the people of the district? If the power to determine the expediency or necessity of granting

licenses to sell liquors in a municipal division can be committed to a commission, a council or a court, which no one can dispute, why cannot the people themselves be authorized to determine the same thing? If a determining power cannot be delegated, then there can be no power delegated to city councils, commissioners and the like, to pass ordinances, by-laws and resolutions in the nature of laws, binding and affecting both the persons and the property of the citizens. If a determining power cannot be conferred by law, there can be no law that is not absolute, unconditional and peremptory; and nothing which is unknown, uncertain and contingent can be the subject of law."

These cases have been cited to show, first, that it is within the competency of legislative authority to enact laws, the taking effect of which may be conditional or contingent, depending upon some uncertain future event; and second, that it is competent for a legislature to delegate to one man or to a certain designated body or class of men, or to the whole people, the question as to when the contingency or event has or shall take place. And such determination is not in any sense the making of the law. It is declaring when a law already made shall go into effect.

In this case the charter had already been enacted. It was perfect and complete in all its parts. It establishes a local government for the city of Butte, defines its authority and prescribes its powers. It was a law. The people of Butte, and no class or portion of them, had any discretion in the matter. They could not add to or take from the law as enacted. The only question submitted to the tax-paying householders was as to when the law should take effect. They had no discretion as to what the charter should contain. That had already been determined by the law-making power. "In what does this discretion consist? Certainly not in fixing the terms and conditions upon which the act may be performed, or

the obligations thereupon attaching. These are all irrevocably prescribed by the legislature, and, whenever called into operation, conclusively govern at every step taken. The law is therefore perfect, final and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed; if employed, it rules throughout; if not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed." *C. W. & Z. R. R. Co. v. Clinton Co.* 1 Ohio St. 88.

The appellants contend that, because this determining power as to when the charter shall take effect and become operative is, by the terms of the act creating it, left to the voice of a majority of the resident tax-paying householders within the limits of the city, and not to the voice of a majority of the legal voters thereof, therefore that the act of incorporation is void.

This proposition does not involve the vital question here. It was not necessary to the validity of the act of incorporation to submit it to the whole or to any portion of the people of the city of Butte for their acceptance or rejection; the provision of the charter requiring its submission to the resident tax-paying householders was conferring the right of suffrage where, before, it did not exist. Instead of being an infringement of and a contraction of the right of the elective franchise, it was an expansion thereof. It was the granting of a privilege where, before, it did not exist. It was a mere act of grace upon the part of the legislature to submit the charter to the people at all, or to any part or portion of them. They could not have complained, or would have had no grounds of complaint, if a municipal government had been established for their city without their consent or the consent of any of them. In that event they would have been deprived of none of their legal rights. How much less have they cause to complain when their privileges have been enlarged and they have been granted



rights that they did not before possess. And so the question as to whether the people of the city of Butte have been deprived of their right to vote, which, as appellants eloquently contend, "is one of the highest attributes of a citizen," does not arise in this case. They could not well be deprived of what they never possessed. They did not have and never had the right to vote upon the adoption of the charter. The legislature conferred the right to vote thereon upon the resident tax-paying householders, and confided to them and their discretion when the law should go into effect. This was the future contingency upon which the operation of the law depended. That the legislature had authority to make the operation of the law to depend upon such a contingency, no one can doubt. The legislature might have confided to one man, a court or judge, to a board or to a commission, to determine when the event had transpired that should set in operation the law.

In the case of *The State v. Parker*, 26 Vt. 357, the court says: "If the operation of the law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and a legal one, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one."

Submitting the charter to the resident tax-paying householders of the city was equal and fair; it was not illegal or immoral; nor was it idle or arbitrary or opposed to sound policy. This limitation of the right to vote upon the charter, and for officers created by it, was intended to place the government of the city in the hands of those who had to bear its burdens and provide funds for paying its necessary expenses. The resident tax-paying householders of any town or city always represent a vast majority of the property of such town or city. They must provide the funds for carrying on the

municipal government. It may be "one of the highest attributes of non-paying citizens" to vote a tax upon those who are the owners of property, and to take possession of the fund thereby created and disburse it; but where the right so to do did not exist under the constitution and laws, and where the legislature, in framing the charter, might have legally deprived all citizens of the municipality of the right to vote upon the adoption of the charter and in the election of officers under it, we do not see that the non-tax-paying, or any other citizens, have any cause to complain that they have been deprived of any of their rights.

Where the right to vote did not previously exist under the constitution and the laws, the legislature, in conferring a privilege upon a locality, has the right to limit the right of voting, or to prescribe any other legal restrictions, as a condition precedent to the privilege. The right to vote upon the adoption of a charter, or at a municipal election, is not an inherent right that belongs to a citizen because he is a citizen. Municipal corporations are creatures of the legislature. Its authority is omnipotent, absolute, within the limits of the constitution and the laws. Within such boundaries it may create a municipal government, define its powers, designate its officers, limit and control their jurisdiction, authority, term of office, duties and forms of proceeding, and when, how and by whom they shall be elected; or it may impose a charter upon the people and appoint the municipal officers, depriving all the people of the right to vote for such officers. When the people elect their representatives to the legislature they exercise their right of self-government; and they must submit to the laws enacted by their representatives, until such laws, by the proper authority, are declared unconstitutional.

Neither the constitution, the organic act, or the laws, confer upon the people living under a municipal government the right to vote, either upon the question of the

adoption of such government or for the election of officers to carry on the same.

The act, therefore, incorporating the city of Butte is not void for the reason that it limits the right to vote upon the adoption of such act and for officers to the resident tax-paying householders of such city. The judgment is affirmed, with costs.

*Judgment affirmed.*



CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT,  
AT THE  
JANUARY TERM, 1882.

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SWEETLAND, appellant, *v.* BARRETT, respondent.

PLEADING — *Statute of frauds* — *Presumption*. — The statute of frauds has not changed the rule of pleadings. A parol promise, valid under the common law, may be declared on now as formerly; the writing is matter of proof and not of allegation.

There is no presumption of law that a contract required to be in writing is parol.

*Time of payment of money owing not fixed*. — If no time is fixed for payment of money acknowledged to be owing, it is due at once, or at any time the payee may choose to demand it.

*Appeal from Second District, Deer Lodge County.*

THOS. L. NAPTON and CHUMASERO & CHADWICK, for appellant.

This action was commenced to recover the amount due on a promissory note made by the respondent and assigned and indorsed to the appellant; complaint in usual form. The respondent admitted the execution and delivery of the note, but denied that the appellant was the owner thereof. This was an immaterial denial, as the fact of appellant having the note in his possession, and bringing suit thereon, made out a *prima facie* case, and legally, to all intents and purposes, he was the *bona fide*

owner. But the issue upon which the case was tried is presented by the affirmative matter set up in the answer. The appellant moved to strike out this part of the answer, and also demurred to the same. The motion and demurrer were not sustained by the court below, were overruled; and to such ruling the appellant, by his counsel, duly excepted. The question to be reviewed by this court is, whether the defense set up by defendant is one that would defeat the action. As it is not averred or proved that such contract was in writing, the court will infer from the rules relative to pleadings that it was a parol agreement. It is unnecessary to cite authorities upon this point.

We learn from the answer that this agreement was made in October, 1876, and that the appellant was to retain the note until he was paid the sum of \$100, with interest thereon at the rate of two per cent. per month. It will be seen that there was no positive time fixed for the payment of this sum; but it appears from the answer that the time of performance was left to be determined by the respondent, and that this date of payment was fixed by his offer to comply with the terms of the contract by tendering the money in September, 1880, about four years after the contract was made.

We therefore claim that this was a parol agreement as alleged, by the terms of which it was not to be performed in one year, and therefore could not be enforced under our statute of frauds. See Montana Laws, p. 578, section 166, first subdivision; also Browne on Frauds, p. 293, giving a decision rendered by the supreme court of Vermont; *Bradwell v. Gutman*, 2 Denio, 87; *Cabot v. Hakins*, 3 Pick. 83; *Lockwood v. Barnes*, 3 Hill, 128; *Lapham v. Whipple*, 8 Met. 59.

2. We claim that there is no consideration to support the contract, as alleged. It is true that the answer states that by the terms of the contract the appellant was to be repaid the sum of \$100, expended in purchasing the note,

and that he was to receive interest thereon at the rate of two per cent. per month. The promise to refund the \$100 paid out is not a valuable consideration. The appellant is only to receive what he had expended, and, the agreement being in parol, he could not recover the two per cent. per month interest. Montana Laws, p. 758, secs. 728-30, and decisions of the courts of this territory.

3. This note was purchased for a sum far less than the amount due by its terms, and if the matters alleged in the answer constitute a defense, it will be readily seen that the temptation or inducement to manufacture this character of a defense is very strong. And the court will scrutinize this alleged contract very closely before deciding that such an agreement as set forth in the answer is valid.

E. W. & J. K. TOOLE, for respondents.

1. There are no exceptions in this case that can be considered by the court. The appeal is from the judgment; there is no statement appended, and no bill of exceptions signed during the progress of the trial. This leaves for review simply the judgment roll. By section 280, page 77, Revised Statutes of 1879, the demurrer to the new matter set up in the answer is deemed excepted to, and might have been embodied in a bill of exceptions so as to become a part of the judgment roll on that account without being specially noted or saved. The judgment roll is defined by section 294 in the above statute, and has been too often ruled upon by this and other courts upon similar statutes, in respect to the matters mentioned, to be any longer an open question, or to require the citation of authorities in support of our position. There was consequently no objection and exception to the ruling of the court upon the sufficiency of the answer under the statute of frauds which forms any part of the judgment roll in this case. In all cases it is a personal privilege; and when the contract is denied, the statute may be invoked



by objection to the admission of oral testimony in support of the alleged contract. But it will be seen that this was not done on the trial, and no bill of exceptions signed, so as to become a part of the judgment roll. The case, therefore, stands thus: Appellant has made no objection to the alleged contract coming within the statute of frauds that can be considered. It is a personal privilege for him to do so, and if the same is otherwise good, the judgment will be upheld. What has been said with reference to the judgment roll is equally applicable to the alleged exception to the instruction. Besides, it was too late. 14 Am. Rep. 618. Besides, counsel entirely mistake the law applicable in this case. First. Because the court, for all purposes under the statute of frauds, will assume in determining the motion and demurrer that the contract alleged in the answer was in writing, *if it was required to be*. See Browne on Statute of Frauds (3d ed.), sec. 505 and note 1. Second. Everything was done under the agreement except the payment of the money. By its terms it does not appear that it was not to be paid within the year, but might have been paid at any time. See Browne on Statute of Frauds, sec. 272 *et seq.* (3d ed.), and sec. 278 and authorities cited. We are unable to see in what manner the statute of frauds can benefit the appellant. He received the note under the alleged agreement, and if he desired to secure on account of the statute, his only remedy would be upon the implied promise to repay the \$100 advanced to respondent. See Browne on Statute of Frauds, sec. 504 and authorities cited in note 2. Third. Neither the motion or demurrer pointed out the objection to the pleading on account of the statute of frauds. See Browne on Stat. of Frauds, above cited, sec. 508. The respondent, by setting out and asking the enforcement of this agreement, becomes an actor, *i. e.*, a plaintiff as to that matter. Fourth. There being nothing but the judgment roll before the court, *i. e.*, complaint, answer and replication, *verdict* and *judgment*, the court will assume

that everything was shown that was necessary to support this *verdict* and *judgment*. While this rule is general, it has been especially applied to cases of this character. *Elling v. Vanderlin*, 4 Johns. (N. Y.) 237; *Rann v. Hughes*, 7 T. & R. 350, note *a*.

We confidently submit that there is nothing in this case that can be considered showing any error, and ask that suitable damages be awarded upon the affirmance of the judgment of the court below. There is, however, now error shown if the question were properly before the court for review.

#### REPLY OF APPELLANT.

In reply to the brief of respondent, we only desire to state that, admitting that the contract set forth in the answer of respondent was void for want of any consideration for the reasons stated in appellant's brief, that in the replication the making of the said contract is specifically denied, and therefore it was not necessary to plead the statute of frauds. See Moak's Van Santvoord's Pl. pp. 505, 555, 867, and authorities there cited. Appellant contends that the demurrer and motion to strike out should have been sustained.

WADE, C. J. This is an action upon a promissory note given by A. H. Barrett, the defendant, to one Thomas Hoopes, or order, for the sum of \$1,260.93, payable one day after date, and by the payee assigned to Wellington W. Sweetland, the appellant.

The answer alleges that in October, 1876, it being understood that Hoopes, the payer of the note, would sell the same for \$100, the appellant and respondent entered into an agreement, by the terms of which the appellant promised and agreed to advance for the respondent the sum of \$100, and purchase the note for said sum, in consideration of which the respondent promised and agreed to repay to the appellant the said sum of \$100, together

with interest thereon at the rate of two per cent. per month from date until paid; that under and by virtue of such contract and agreement, the appellant did advance the sum of \$100, and did then lay out and expend that sum in purchasing said note from Hoopes, which purchase was made for the sole use and benefit of the respondent, which sum, together with interest thereon, at the rate named, is due and owing to appellant; that by the further terms of said contract, the appellant was to retain the note until the respondent had paid said sum of \$100, with interest, as aforesaid.

There was a demurrer to the answer for the reason that the same did not state a defense to the action, and also a motion to strike out the same for the same reason, which demurrer and motion were overruled.

The position of appellant is this: that as it is not averred in the answer that the contract set forth therein was in writing, therefore the court will infer that the same was a parol agreement; and that as there was no time fixed for the repayment of the \$100 by the terms of the agreement, and that the respondent fixed the date of such payment by his offer to pay the same and to comply with the terms of the contract by tendering the money in September, 1880, four years after the contract was made, therefore that the contract was within the statute of frauds and void.

We do not agree with counsel for appellant upon either of these propositions. There being no time fixed for the payment of the \$100, the same was due and payable at once, or at any time. The meaning and effect of the transaction was that the appellant loaned to the respondent \$100, and he was to hold the note to Hoopes as security for the loan.

There is no presumption that the contract was parol. It is well settled that the pleadings need not allege that a contract which would be void unless reduced to writing and signed was in fact in writing.



When the pleading alleges an agreement which would be within the statute of frauds unless in writing, it will be presumed to be a written agreement, and if denied, such an one must be proved. 1 Moak's Van Santvoord's Pleadings, 206, 674.

It is now well settled in this country, that, in a suit at law or in equity upon a contract affected by the statute of frauds, the declaration or bill will be sufficient if it allege a contract generally, without stating whether it is in writing or not. Browne on Stat. of Frauds, sec. 505.

The statute of frauds has not altered the rules of pleading in law or equity. A declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner since the statute as it might have been before. The writing is matter of proof and not of allegation. *Price v. Weaver*, 13 Gray, 273.

The judgment is affirmed, with costs, but appellant to pay costs of appeal.

*Judgment affirmed.*

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KLEINSCHMIDT ET AL., appellants, v. McANDREWS ET AL., respondents.

This is a rehearing of the case decided at the January term, 1881. See *ante*, p. 8, for points decided and argument of counsel.

\* GALBRAITH, J. This case is presented to us on a motion for a rehearing. It was considered at the January term of this court for 1881, and an opinion then rendered. The action of the court in dismissing the appeal and affirming the judgment was, as stated in that opinion, for the reason that the proceedings in the court below were not properly brought before this court for review;

the method provided by the Code of Civil Procedure for this purpose not having been pursued.

After a careful perusal of the opinion then rendered and an examination of the arguments of counsel on the hearing, we see no reason to reconsider our judgment in the premises, but are rather confirmed in our views of its correctness.

In relation only to the question as to whether or not the case is properly before this court for review, we will briefly consider the reasons urged by the appellants on the rehearing.

It is claimed that the whole record which contains the pleadings, together with all the proceedings and evidence in the case, is a bill of exceptions. The record does, indeed, at the outset, purport to be a bill of exceptions. As such a bill of exceptions it is not, however, signed by the judge. See Code of Civil Procedure, sec. 816.

The Code of Civil Procedure does not anywhere contemplate such a bill of exceptions. It does not come within the definition of an exception as provided by law. See Code of Civil Procedure, sec. 279. To hold such a bill of exceptions sufficient would be to establish the precedent, that where the entire record purported at its commencement to be a bill of exceptions, this court must then notice every error which the ingenuity of counsel could suggest, without any further specification of the objection in the record whatever. Such a character of practice will not bear consideration for a moment.

Again, it is claimed that the motion for a non-suit contains evidence of which this court is bound to take notice, because contained in the motion itself. But the motion for a non-suit is no part of the judgment roll. See Code of Civil Procedure, sec. 294. Therefore, the motion for a non-suit not being a part of the judgment roll, this court cannot consider the evidence contained therein; for an appeal from the judgment alone, without a statement on appeal, as provided by sec. 419 of the

Code of Civil Procedure, brings up nothing but the judgment roll.

We are referred to the case of *Cravens v. Dewey*, 13 Cal. 42, where Baldwin, J., uses the following language: "The second error assigned is in granting a non-suit. A preliminary objection is taken that no motion for a new trial was made. Nor was any necessary, the granting of a non-suit on the facts being a pure question of law, which is properly raised on the record for a review by exception taken."

That a motion for a new trial was not necessary was held in the former opinion rendered in this case. Even if we were inclined to agree with the other position held, viz., that an exception may be taken to the granting of a non-suit on the facts, nevertheless the exception should comply with the requirements of the law in particularly stating the point of the objection, and also so much of the evidence as is necessary to explain it. The exception in this case is entirely defective in this particular. The motion which is alleged to contain the evidence not being a part of the judgment roll, and the exception itself not containing such evidence, nor designating the point of the objection, as required by law, how can this case be held to be properly before us for review?

But the plain provision of the Code of Civil Procedure, in defining an exception to be "an objection taken at the trial to a decision upon a matter of law, . . . from the calling of an action for trial to the rendering of the verdict or decision," and in designating what are deemed to have been excepted to (secs. 279, 280, of Code of Civil Procedure), as well as the general current of our own and the California decisions on this subject, seem to us to be conclusive as to the correctness of the position held in our former opinion, that an exception, as defined in the above section 279, cannot be taken to an order granting a non-suit on the facts.

A strict adherence to the plain and practical require-



ments of the Code of Civil Procedure, in relation to the method of bringing cases here for review, will insure improvement in the practice, an end most useful and advantageous to the profession.

The judgment is affirmed, with costs.

*Judgment affirmed.*

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JOHN W. FROST ET AL., appellants, v. JOSEPH O'NEIL, respondents.

REMEDY ON APPEAL.—The proper remedy on appeal from a final decision of non-suit is by a statement on appeal in accordance with sec. 419 of Code of Civil Procedure.

A bill of exceptions, to become part of a judgment roll, and entitle it to the consideration of an appellate court, should be taken during the trial and before the final decision.

*Kleinschmidt et al. v. McAndrews et al.* 4 Mont. p. 8, considered and applied.

*Appeal from Third District, Lewis and Clarke County.*

H. R. COMLY and SHOBER & LOWREY, for appellants.

The appellants rely upon the following points for a reversal of the judgment in this case:

1. The court erred in refusing to permit Geo. Foote and O. B. Totten to testify concerning the usages, customs and regulations in force in the county or district in which the property in controversy was situate. In actions respecting mining claims, proof must be admitted of the customs, usages and regulations established and in force at the bar or diggings embracing such claim. When not in conflict with the laws of this territory, such customs, usages and regulations must govern. See sec. 363, p. 3, R. S. of Montana Territory; sec. 2394, R. S. of the United States. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory

in which the district is situate. The evidence sought to be introduced was calculated to show that the appellants had complied with the customs and usages of miners in relation to placer mine locations in the county of Lewis and Clarke, Montana territory. The place where the ground in controversy is situate, said county of Lewis and Clarke, being in fact the district in which said disputed claim was and is situate. See Transcript, pp. 18-21, inclusive.

2. The court erred in refusing to permit appellants to introduce in evidence the record of their location of the mining ground in controversy. See Record, Transcript, pp. 22-24, in bill of exceptions. It is the universal custom of the miners throughout the territory to record the notices of their location of placer mining claims, previous to application to enter the same, with the county recorders of the respective counties in which claims may be located.

3. Claims, usually called placer claims, including all forms of deposit, excepting quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims. See sec. 2329, R. S. of U. S.

4. It is admitted by the answer of defendants, that plaintiffs filed their adverse claim as prescribed by law, and within the time by law required. See complaint and answer in record.

5. The evidence shows that on the 12th of February, 1880, the whole of the ground claimed by plaintiffs, and embracing the land in controversy, was vacant and unclaimed mineral land of the United States, and that on the 12th of February, 1880, they had the same surveyed and the boundaries thereof plainly marked, so that the boundaries thereof could be easily traced. See Transcript, pp. 11 and 12. And that at the time plaintiffs marked out and established the boundaries of said land

there were no marks, stakes or mounds indicating that any one claimed any of said land. See Record, p. 13.

6. The answer admits that plaintiffs are in the possession (actual) of a portion of the premises in controversy. See answer of defendants, Record, p. 8.

7. It is not denied but that the defendants' application to enter said land was made after plaintiffs had established the boundaries of their claim, including the ground in controversy. And there was no evidence showing that at the time plaintiffs took possession of the lands in controversy there were any marks indicating that any person claimed the same or any portion thereof. But the evidence does show that the first boundaries marked and established to the premises in dispute were by plaintiffs. See Transcript, pp. 11-13, inclusive.

The plaintiffs, as shown by the evidence, took possession of the land in controversy in February, 1880, and then plainly established the corners and marked the exterior limits thereof, so that the boundaries could be easily traced, and made valuable improvements thereon, and continuously remained in the actual possession. Subsequently thereto, and while plaintiffs were in the actual possession thereof, the defendants, in March, 1880, had the land surveyed, and applied to enter the same. Could the defendants, by such acts, oust the plaintiffs of their actual possession or deprive the plaintiffs of their prior acquired rights thereto, or defeat them from maintaining their right of possession? We maintain they could not, independent of any record or custom of miners.

This is an action under the laws of congress to determine the right of possession under a special law. The evidence shows the plaintiffs are in possession and were the first to possess the same, and it is admitted by the pleadings that the land in controversy is mineral land, and both parties claim it as such. There is no law declaring that the person first applying for a patent shall have any advantage over any other person filing an ad-



verse claim. The case of *Moxon v. Wilkinson* is not in point. In that case the evidence showed that appellants never made any mining improvements until after respondent had made application to enter the same, and after suit instituted by appellants in said cause. The court there held that the testimony offered by appellants was inconsistent with the title by appellants sought to be maintained. See 2 Mont. 425.

The courts will not sustain a trespass upon land in the possession of another merely because he has taken the initiative to pre-empt or to acquire title from the government. On the contrary, the party in possession, or who is entitled to the possession, alone is entitled to acquire the said title. *Artherton v. Fowler*, 6 Otto, 513; *Hosmer v. Wallace*, 7 Otto, 575.

E. W. TOOLE and SANDERS & CULLEN, for respondents.

1. The judgment of non-suit in this case was entered on the 26th day of May, A. D. 1881, and the bill of exceptions thereto appears to have been taken on the 30th day of May following. A bill of exceptions, to become a part of the judgment roll, must be taken before the rendering of the verdict or decision in the case. Sec. 279, Code of Civil Procedure.

The testimony included in the record in this case is embraced in the so-called bill of exceptions; no statement on appeal having ever been made in said cause. The bill of exceptions so taken, not being a part of the judgment roll, the court cannot consider such testimony on this appeal.

2. But if the court is disposed to consider the propositions raised by the testimony in said bill of exceptions, then we submit:

*First.* The record in the case upon which appellants base their claim to the premises in controversy, as well as to the other portions of their said claim, in connection with the testimony shows the undisputed fact to be that

there was embraced within the limits of the ground described a dump and road site, which was not subject to entry, by reason of which there was no identification of any claim which appellants were entitled to enter under the laws of the United States. See R. S. sec. 2324. It is therefore void for uncertainty, as it puts it in such shape that it may be floated to the extent at least of the dump and road site, whatever that may be. *Gleason v. Martin White Co.* 13 Nev. 442, 446-7.

*Second.* Because the location, embracing a large quantity of land which was not the subject of location, rendered it uncertain, so that its boundaries could not be traced either readily or at all, by reason of which the location is void. *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 210.

*Third.* The location referred to in sec. 2324, United States Revised Statutes, must be construed with reference to the character and quantity which can be taken up under that section. In this view of the case there has been no location made of any land which might be properly located by appellants, "by distinctly marking it out upon the ground, so that its boundaries can be readily traced," and this fact was disclosed by the uncontradicted testimony of appellants.

*Fourth.* The testimony shows that there was and is in controversy in this case four acres and a fraction only of the land claimed by appellants, and there was no evidence to determine the *locus in quo*, or to so identify it as to form the basis of a verdict of the jury or upon which the court could render judgment.

*Fifth.* This case falls within the rule established in *Moxon v. Wilkinson*, 2 Mont. 421, in every particular.

*Sixth.* The section of the statutes referred to by appellants, sec. 363 of the Code of Civil Procedure, refers to bars or diggings and to customs, etc., there established, and does not apply to such locations as the one sought to be made in the case at bar.

## REPLY OF APPELLANTS.

There is nothing in the point that the evidence embraced in the record should not be considered.

1. During the trial the first exception was taken upon the refusal of the court to permit certain testimony. See Record, p. 21.

2. The second exception was taken during the progress of the trial to the introduction of the record of plaintiff. See Record, p. 22.

3. And there the record contains the following: "And the foregoing was substantially the proceedings in the case." See Record, p. 25.

4. And the appellants, upon the granting of the non-suit, presented their statement and bill of exceptions, which was signed, sealed and made a part of the record of the case. See Record, p. 29.

5. The main question presented for consideration is this: "After 'A' has appropriated a piece of unoccupied and vacant placer mining ground, by plainly defining the boundaries thereof, and entering into the actual possession of the same, and making in good faith valuable improvements thereon, can 'B' obtain a deputy mineral surveyor, and survey the same ground or any portion thereof thereafter, and because he, 'B,' makes the first application to the land office for patent thereto, destroy all right that 'A' acquired, and defeat any action 'A' may commence, after filing his adverse claim, to determine the right of possession?" We think not.

• GALBRAITH, J. This is an appeal from a judgment of non-suit, in an action to quiet title.

Upon examination of the record before us, we find that it purports to be a statement and bill of exceptions. There does not appear to have been at any time an exception taken to the order sustaining the motion for a non-suit, as provided in sec. 279 of the Code of Civil Practice,



which is the only kind of specific exception recognized in our practice.

A statement of the pleadings, evidence, motion for non-suit, order sustaining the same, and judgment thereon, and what purports to be a "statement and bill of exceptions," was presented to and signed by the judge as correct, four days after the trial. But this is not an exception as provided by law. The only exception appearing in the record is an exception to the action of the court in sustaining an objection to the admission of the declaratory statement in evidence.

But this exception is defective, if in no other particular, in that it does not designate the point of the objection.

But we have already held, in the case of *Kleinschmidt et al. v. McAndrews et al.*, which was affirmed upon the rehearing in an opinion rendered at this term, that the only proper method of bringing up a judgment on a non-suit for review is by statement on appeal. There is no such statement before us in the record. Sec. 419 of the Code of Civil Procedure.

In addition to the reasons advanced in the opinion referred to, we will add the brief one which follows: Section 279 of the Code of Civil Procedure defines an exception to be "an objection taken at the trial to a decision upon a matter of law, . . . from the calling of a case for trial to the rendition of the verdict or decision."

The section following, 280, provides what "are deemed to have been excepted to," among which is enumerated "the final decision in an action or proceeding."

The order of court sustaining the motion for a non-suit is certainly the "final decision in the action."

Sections 281, 282 and 816 provide the method for preparing an exception, and what it shall contain. And when so prepared, it is called a bill of exceptions. Certainly the language employed in sections 281, 282 and 816 is only applicable to an exception as defined in sec. 297, and

not the phrase "are deemed to be excepted to," used in sec. 280.

The code provides three methods for bringing evidence before this court: 1st, in a bill of exceptions, as provided in the foregoing sections; 2d, by a statement on motion for a new trial; 3d, by statement on appeal.

These three methods are fully adequate for the purposes for which they were intended. They afford a plain, easy and safe guide in all cases.

Being provided by the law-making power, we think also the maxim applies, "*expressio unius, exclusio alterius.*"

The order sustaining the motion for a non-suit being, as we have noticed, the "final decision," it is "deemed to have been excepted to," as provided in sec. 280, and an exception, as provided in sec. 279, cannot be taken thereto.

Therefore the evidence upon which it is ordered cannot come before this court in a bill of exceptions. As we have seen in the case of *Kleinschmidt et al. v. McAndrews et al.*, a motion for a new trial is not necessary. Nor, indeed, could there be a motion for a new trial on the evidence already in the case, for a trial as provided by the code never was had when the court grants a non-suit.

Therefore the evidence cannot come before us in a statement on a motion for a new trial. The only remaining means provided by the code is by a statement on appeal, which we hold to be the proper method for bringing up the evidence upon which the court below has ordered a non-suit.

Judgment affirmed, with costs.

*Judgment affirmed.*

JAMES K. PARDEE, respondent, v. HUGH T. MURRAY  
ET AL., appellants.

**POSSESSION OF LODE CLAIM.**— Possession of the surface of a lode claim is possession of all veins, lodes and ledges whose tops or apexes are within such surface lines, and possession of such surface protects all such veins, lodes and ledges from operation of the statute of limitation.

No adverse possession could become operative by going outside of the surface boundaries and sinking a shaft upon what was claimed as another location, but which the jury found to be the same. Adverse possession that could ripen into a title must be open, notorious and under a claim of right.

The statute of limitations would only begin to run from the time that it became known to the prior locator that the new location was being worked upon the same vein or lode.

**PLEADING.**— Defendant having denied possession of plaintiff's ground, the court held rightly that no testimony offered by defendant of forcible possession was admissible. Testimony must conform to the allegations of the pleadings.

**CROSS-VEINS.**— In case of a cross-vein the prior locator is entitled to all the ore or mineral within the space of intersection, but the subsequent locator has the right of way through the space of intersection. If the latter should take the ore from the space of intersection, he would be liable therefor in an action of trespass.

*Appeal from Second District, Deer Lodge County.*

E. W. & J. K. TOOLE, for appellants.

The record in this case discloses the following state of facts: That plaintiff filed his complaint in said cause in the district court, second judicial district, Deer Lodge county, Montana territory, in which he alleges that on or about the 9th day of August, A. D. 1879, he was in the quiet and peaceable possession of the property therein described; that defendants, at said date, entered upon said property, and dug and extracted ore therefrom to his damage in the sum of \$20,000, with a "continuendo" covering future damages. There is no allegation of title other than that above mentioned.

In addition to this there is a separate count and a prayer for equitable relief.



Defendants come in and, by answer, deny the possession thus claimed by plaintiff, and set up title, possession and right of possession in themselves, and likewise answer the count in which plaintiff asks equitable relief.

To this answer plaintiff filed his replication.

After the issues were thus framed and a restraining order granted, as prayed for, plaintiff, by leave of the court, filed a supplemental complaint, in which he alleges a subsequently acquired title and nothing more. To this supplemental complaint defendants demurred, which demurrer was overruled, whereupon they filed an answer thereto denying such title, and in proper form set up possession adverse to plaintiff and pleaded the "statute of limitation" in bar of this action. The case went to trial, as appears from the statement on appeal, upon the foregoing issues and pleadings:

1. It will be seen that until the supplemental complaint was filed, the issue tendered was one simply of naked possession. The right of the plaintiff to recover upon the case then made was the issue upon which his recovery, if at all, must be had. That is to say, if, under the *state of facts as they existed at the time of filing the supplemental complaint*, plaintiff could not recover, he cannot bring to his aid a title afterwards acquired by a supplemental complaint, and thereby import into his original action an element without which he could not otherwise recover. See *Hugeman v. McCunniff*, 2 Col. 367 *et seq.*; Sedgwick on Measure of Damages, 143.

2. Hence the all-important inquiry is, how stood the case with respect to the right of the parties prior to the acquisition of the title set up by the supplemental complaint? In this view of the law, the question of the possession of the property, out of which the alleged damage to the freehold occurred, is of the utmost significance, as plaintiff could not by his "patent" title afterward acquired expand or extend his possession so as to give rise to a cause of action which did not exist when

the suit was instituted. The court erred in not letting defendants show that they were in the actual occupancy and possession of a part of the property in question. See Record; Cooley on Torts, p. 322, and case cited; Chitty on Pleadings, 202-3; *Uttendorffer v. Saegers*, 50 Cal. 496; *Gardner v. Hast*, 1 N. Y. 528.

3. The same principles equally apply to the instructions offered by plaintiff, given by the court, and to which objections and exceptions were duly taken by defendants. See Instruction No. 5, Record, p. 000; *Reperts v. Fiori*, 50 California, 363; *Lamb v. Burbank*, 1 Sawyer, 232; *Campbell v. Rankin*, 0 Otto, p. 99.

4. The defendants' plea of the "statute of limitation" in bar of the plaintiff's action was full and complete. The plaintiff's right of action in ejectment accrued as well before as after patent. The law itself recognizes the "statute of limitation" of the territories, which confers a title upon an adverse possessor within one year after the statute is set in motion. See U. S. R. S. p. 430, sec. 2322. It certainly could not be successfully contended that if plaintiff's title was extinguished by defendants' adverse possession, this right to recover damages thereafter did not thereupon also cease.

5. The defendants, then, had a right to show their location and possession of the property in question: 1. For the purpose of showing that they entered not as naked trespassers, but in good faith, under color of title. 2. To show the extent and character of their possession. 3. That it was such as set the "statute of limitation" of the territory in motion. 4. That by reason of this they had acquired a title by adverse possession, and thereby defeated the plaintiff's action. See Record, from p. 118 to p. 131, inclusive; Codified Statutes, pp. 591-2, secs. 2-4; 420 *Manufacturing Co. v. Bullion Manufacturing Co.* 9 Nev. 240; *Davis v. Clark*, 2 Mont. 394; 2 Black (U. S.), 394; *Leffingwell v. Warren*, 2 Black (U. S.), 599; *Clarke et al. v. Courtney et al.* 5 Pet. (U. S.)

366, 509; *Golden Fleece Manuf'g Co. v. Cable Con. Co.* 12 Nev. 321.

It will be seen from these bills of exceptions that defendants were seeking to show their title and right of possession to the property in question, whether it be the same or a different ledge; and that the exclusion of this title, thus offered, left them irredeemably naked trespassers. Certainly they should have been permitted to have shown these facts, as affecting plaintiff's right to recover damages. If it formed a link in the chain of title, it should have been admitted. Otherwise the court puts the defendants in the attitude of naked trespassers, and leaves nothing for the jury to pass upon save the one single question of damages. The denials put distinctly in issue the possession of plaintiff, and the affirmative matter cannot dispense with his proof upon the issue joined by the denials. See Pomeroy's Rem. and Rem. Rights, secs. 721-2; Copp's U. S. Mining Law.

Besides this, it absolutely concedes the title to be in plaintiff; refuses defendants the right to controvert it under the denials in the answers; and authorizes a recovery of damages, notwithstanding the defendants, at the time of the alleged trespass, may have been in possession under claim and color of title, and continued so up to the time of the commencement of the action. We contend that, even when title is shown in plaintiff at the time he sues, which is not the case here, either by averment or proof, he must be in the actual possession of all the property. Otherwise the acquisition of title to part of the premises by adverse possession may be acquired. • He must, therefore, regain possession, in some way, of the property adversely held before he can sue for damages to the freehold. He cannot recover when defendants are in possession adversely under claim and color of title. See Record, pp. 129 to 131, inclusive.

It will be seen, from the bills of exception contained in the record, that defendants sought to show that, prior



to the purchase of the property in controversy, or that portion thereof claimed by defendants, their adverse possession and claim was not by reason of underground entrances, but by a winze and shaft from the surface, inside of this surface-claim, which was sunk down and upon the vein, and that this constituted the trespass complained of. This, we claim, was error. *Hugeman v. McCunniff*, 2 Col. 367 *et seq.*

Admitting this to be a cross-vein or strata of quartz or ore, and that defendants were in possession of the surface and vein beneath at the crossing or intersection, and at such point of intersection plaintiff was entitled to the quartz or ore when it crossed this vein or intersected it, would not defendants' surface location and possession give them possession of all beneath in the vein claimed by them, upon the same principle that it gives plaintiff a possession?

Would it not give them a title by adverse possession as to such portion of plaintiff's vein as they had actually located on the surface and held and worked from 1875 to 1879, when the injunction was granted, even though it cut through plaintiff's vein? But above all, it is no trespass to work this vein so claimed by defendant through and across plaintiff's vein. He would only in such case be entitled to the quartz, and such is not the action he has brought. See R. S. U. S. sec. 000.

Certainly, plaintiff to recover must show his title, and in order to do this must show there was no cross-vein in order to recover in trespass. This he failed to do; and having failed in this, he cannot recover in this action under the section of the United States statutes referred to. See fourth special issue submitted, Record, pp. 403, 404.

As to the sixth finding of the jury, defendants were not permitted to show their location, actual occupancy and possession of the particular portion of the property claimed by them. They offered the same character of

evidence, aside from the patent (which we have shown cannot create a cause of action that did not actually exist at the time of the commencement of this suit), that was admitted on the part of the plaintiff. It was excluded, and there was consequently nothing upon which the jury could base this finding in favor of the defendants. The court might, probably, upon the rendition of a final decree as affecting the prayer for a final injunction, entertain the evidence of a title disclosed by the patent and set up by supplemental complaint; but as to the action at law, the plaintiff must stand or fall upon the facts as they existed at the time his suit was brought; and the title and possession by defendants should have gone to the jury under instructions from the court.

As matter bearing upon both of those issues, defendants should have been permitted to show that the general strike or course of all the veins in that vicinity was in the direction of the vein claimed by defendants. It was some evidence tending to show the actual existence of defendants' vein, and tended to show the general formation of the country there and in that vicinity.

There was error in excluding this evidence. Especially was it so, after Foote had testified to his knowledge of the formation of the country in that vicinity, and defendants, to test his knowledge and show what such formation was, sought to interrogate him upon the subject. See Record, pp. 59, 208. He had also testified to having surveyed and explored the "Salmon" lode, the "Cliff Extension," "Shark Town" and "Scratch-All" lodes. See Record, p. 198. Had testified as to the strike of the "Estell" and other ledges. See Record, p. 209.

In support of the possession of the defendants since 1875 to the commencement of the action, as applicable to the fourth special issue submitted to the jury, defendants sought to establish an actual possession of surface and underground portion of this claim, by Durfee, and the

court refused to admit the testimony for this purpose. See Record, p. 102.

This certainly was error. The court seemed to have proceeded upon the basis that, if plaintiff was the owner of the property by prior right, then there could be no actual and adverse possession of the property in another. The very nature of an adverse possession presumes title and possession in the owner; "ouster" and occupancy under claim and color of title in another. Without this there could be no adverse possession under the "statute of limitation."

The question of adverse possession is a question of fact for the jury, and the court should have permitted any and all the evidence tending to show such fact to have gone to the jury, and covered the legal questions applicable to them by instructions. See *Shuffleton v. Nelson*, 2 Sawyer, 540.

So an action for damages involves solely a question of injury to the possession, and possession was the gist of the action. Cooley on Torts, 332, 322.

Defendants sought to show that they were in possession of the veins or lodes known as the "Scratch-All" and "Shark Town," and that they went down and upon the same from the surface inside of their surface ground, and worked it from 1875 to the granting of the injunction, under color of title and claim of right. The court should have permitted this to be shown in order to support the plea of adverse possession at the time of the alleged trespass, as well as the plea of the "statute of limitation." The case of *King v. The N. M. & Ex. Co.*, decided at this term of court, is in point. Morrison's Mining Digest, p. 5, sec. 1; *Eige v. Medler*, 82 Pa. St. 86.

But here, even a surface claim defined and worked continuous therefrom, on and upon the ore, was sought to be shown. *Armstrong v. Caldwell*, 53 Pa. St. 284.

The complaint sworn to by plaintiff, in which he alleges possession in defendants, and the declaration of



plaintiff's predecessors as to where the boundaries between their claims were, was certainly competent, and would have been of great weight. Civil Practice Act, 601, 603, 624; 3 Wash. on Real Prop. (4th ed.) 118-120.

We shall not endeavor to answer all the propositions presented by counsel for respondents in the short time within which a reply is required, but shall content ourselves by answering such portions thereof as we conceive touch the most vital questions involved in the case. We do not desire, however, to be understood as waiving any of the errors assigned in the record, but we now here, and shall in the argument of the cause, insist upon the same.

1. Respondent does not state the issues involved in the case as we understand them. It will be conceded, we assume, that the defendant may set up any and all defenses he may have under our system of practice. And if, upon the trial, he establish all or any one of them, he is entitled to recover. We therefore submit that, upon the inspection of the record, it will be found that the following *issues* and *questions* arising upon the same are fairly presented for the determination of this court:

1. First, that the issues tendered by the respondent in his complaint on the 23d day of August, 1879, were solely on account of his actual possession of the property in question at the time of the alleged trespass, and that the possession of plaintiff was denied in the answer.

This, then, presents the first issue, the materiality and effect of which will be discussed in its order.

2. That appellants are the owners of the "Shark Town" and "Scratch-All" lodes, and sought by competent evidence to identify the *locus in quo* of the same; which is, in effect, tantamount to a denial of title in anybody else as to these particular pieces of property.

This presents the second issue and question involved under it.

3. That, in addition to the denial of respondent's title,

as alleged (*i. e.*, possession), to any of the property claimed by him, and the assertion of title of appellants to the "Scratch-All" and "Shark Town" lodes, they allege that the "Scratch-All," owned by respondents, lies east and adjoining the "Salmon" lode. This, we contend, then, is an allegation of ownership of the property by appellants up to the "western" boundary of the "Scratch-All," and a limitation of the eastern boundary of the "Salmon" at this point. Upon this proposition appellants sought to establish the boundary of the "Scratch-All" and their title thereto.

This presents the third issue and questions presented under it.

4. Appellants, under like claim of title to the "Shark Town" lode, and the allegation that it was a cross lode and intersected and crossed the "Salmon" and "Cliff Extension" lodes, sought to show that they were the owners thereof, and had been in possession of and working the same from 1875 up to the appointment of a receiver in 1879.

This is the fourth issue and question presented under it.

5. Appellants sought to show, under this allegation of ownership of the "Scratch-All" and "Shark Town" lodes, that they were in the actual adverse possession and occupancy thereof since 1875; the location of the property, marking its boundaries, recordation of the same, and actual possession and working of the same on the surface and underground, as shown by bill of exceptions, in record, pp. 120 to 128, inclusive. To which the attention of the court is directed, as the fifth issue and question to be determined.

6. That the same question is also presented by rejection of similar evidence to support the allegations of adverse possession of appellants since 1875, as will be seen from bill of exceptions, record, pp. 129 to 131, inclusive.

7. That, for the purpose of showing adverse possession

of the "Scratch-All" and "Shark Town" lodes, and identifying the *locus* of the same, under their allegation of title and adverse occupancy, and to defeat a recovery of plaintiff in this kind of an action, appellants offered to prove: 1. The location of and marking out of said property upon the surface. 2. The recordation of the same. 3. The actual occupancy and work thereon upon the vein and quartz upon which the alleged trespass occurred by shafts connecting the same from the surface, so as to defeat this kind of an action; which was not permitted by the court, as will be seen by bill of exceptions, record, pp. 116 to 117, inclusive, and from 117 to and inclusive of 131.

8. For the purpose of showing the *locus* of the eastern boundaries of the "Salmon" and "Cliff Extension" lodes and the *locus in quo* of the "Scratch-All" and "Shark Town" lodes, appellants sought to establish by a competent witness, the predecessor in interest of the respondent, while in possession thereof, the extent of their claim, as provided by section 603 of the Code of Civil Procedure, which was refused by the court, as will appear by bill of exceptions, record, pp. 118 and 119.

These, we say, present the principal questions involving the admission or rejection of evidence, under the issues made, and necessarily growing out of the allegation of the answer of appellants.

If we can show that there was error in them, or any of them, that was material in the defense, all of the other propositions discussed by counsel for respondent are immaterial, and this case should be reversed.

• The conclusion is irresistible from the record, heretofore cited, that the court ignored every question in the case involving the title of appellant; made him thereby a naked trespasser, and limited the inquiry to the sole question of damages; unless it can indeed be said that the question of boundary of the respective claims was allowed to be only partially presented by the appellant,



by reason of the rejection of the declarations of Estell, the predecessor in interest of respondent.

If, however, the complaining party was not allowed the full benefit of all his legitimate evidence upon the question of these boundaries, it is, to all intents and purposes, likewise eliminated from the case.

We earnestly request the court's attention to the proposition that by the exclusion of the location, record, evidence of the *locus in quo*, possession, occupancy and work of appellants upon the property upon which the alleged trespass was committed, it virtually says that the only issue is the boundaries of the claims of the respective parties and the damages incident to the trespass.

That is to say, that, because appellant, among the other issues and defenses he has made, has sought also to present the question as to the boundaries of the lodes in question, he is thereby limited to the latter issue alone; and on that account he loses the benefit of his allegations of title, adverse possession and occupancy of the property in dispute from 1875 to the time of the institution of this action. The exceptions, from p. 57 to 131, contained in the record, show this to be the fact. Hence, if the exclusion of the evidence of Estell, referred to upon the question of boundaries, was error, there is and was nothing left for the jury except the single question of damages. The evidence to support the issues, submitted on the part of the defense, was eliminated from the case, and the findings of the jury were based upon *ex parte* testimony.

We shall confine ourselves to the bills of exception contained in the first *part* or *section* of the record in this case, without reference to the voluminous matter unnecessarily incorporated in the balance of the transcript; and invite the attention of the court to the following points and authorities, under the respective headings of this brief, in their regular order:

Upon the first proposition presented, we respectfully submit: That the only allegation of title made by the re-

spondent is such as follows from actual possession of the property in dispute.

Dispense with this allegation and the issues made under it, and there is nothing left except the simple claim of damages, without any averment of title whatsoever. There is no allegation of ownership, by reason of which a constructive possession and right of possession attaches on account of such an averment. Nor can the plaintiff base his action upon the naked averment of actual possession, and support it by proof of a legal title and the constructive possession that follows from it. While actual possession is *prima facie* evidence of title, such an allegation in the pleading is not an averment of actual title and constructive possession. Nor can such presumption be fairly indulged from an allegation of this kind. If his proof fails to establish an actual possession, he cannot hypothecate his case upon actual title and constructive possession and recover. There is quite a difference between *evidence* of possession in support of an *allegation* of title, and an allegation of possession alone and evidence of title to support it. In the latter case, evidence of title carries with it only *constructive possession* as *contradistinguished* from *actual possession*. But it is claimed by counsel that the real title was in Holland and Estell, and that he went in under them.

This still assumes that respondent occupied under the paramount owner; but the question of his occupancy is still put in issue. If he had only authority or right of entry under Holland and Estell, this does not give him a constructive possession, as this follows only the legal title. It gives him only a *right of* possession, while the action is for damages *to* the possession. He has a right to recover the possession, but not a right to damages arising from the trespass upon the property while out of his possession. We assert these propositions as correct: 1. That the owner of real estate, who is deemed to be in the constructive possession of the same, cannot maintain

an action for the damage done by the trespass complained of while the same is in the actual possession of the trespasser under color of title. 2. That our statute has made no innovation upon this doctrine, except in so far as it permits the real owners or persons entitled to the possession to unite this kind of an action with an action to recover the possession. See *Rowland v. Rowland*, 8 Ohio, 40 *et seq.*

These principles are too elementary in their character and too firmly and universally established to require other authority or argument in support of them.

Appellants may show as many titles as they have, and, if all fail, can rely upon their actual adverse possession. *Mackey v. Reynolds*, 2 Bay, 475 and 429; *McClain v. Todd*, 5 J. J. Marsh. (Ky.) 335; *Webb v. Stutevant*, 2 Ill. (1 Scam.) 181; *Davis v. White*, 27 Vt. 571. And especially *Cook v. Foster*, 7 Ill. 652; *Davis v. Wood*, 14 Mo. 71; *Gardner v. Heart*, 1 N. Y. 528.

It was sought, by the evidence offered, to show that there was no original trespass against respondent's possession; that appellants had acquired an adverse possession under color of title since the title of Holland set in, before respondent's purchase and the commencement of the action. In other words, an intervening right of adverse enjoyment. *Tipping v. Gallop*, 8 Iowa, 74; *Warner v. Cochoran*, 30 N. H. 379; *Gardner v. Heart*, 2 Barb. 165; *Buckley v. Dalbare*, 7 Conn. 233; 20 *id.* 30; *Shields v. Henderson*, 1 Litt. (Ky.) 239; *Abbott v. Abbott*, 51 Me. 575; *King v. Baker*, 25 Pa. St. 186.

Nor can it make any difference that appellants' record called for another piece of ground, or that he was mistaken in the same, if the *locus in quo* was actually occupied and claimed by appellants. *Cochoran v. Whitesides*, 34 Mo. 417; *Crary v. Goodman*, 22 N. Y. 170, and authorities there cited.

If, then, this be true, all the attempts of counsel to bring to the aid of his allegations of actual possession the



title of his predecessors is utterly unavailing. He must stand or fall, as a matter of law, upon his actual possession.

The title or right of possession invoked to his support will not afford the required relief.

The issue of possession, whether tendered on account of title or not, must be sustained. If the property is in the actual possession of another, claiming it under color of title, neither the owner nor the party entitled to the possession can maintain this action until he regains possession, unless, forsooth, under the statute, he unites it with an action for the possession. The presumption of actual possession in the true owner no longer obtains when the property is shown to be in the adverse possession of another. And when this condition of affairs is shown, his right to this kind of an action against the possessor does not exist. If the possessor claimed, occupied and worked it as his property, that he asserted it to be a different lode from the "Salmon" lode, can be of no consequence. The real question is, was he in the adverse possession of the *locus in quo erat*? If so, he was entitled to prove it and defeat the action. Actual possession, under such claims, is the test of the validity of his defense.

It will also be observed that appellants sought to show actual possession of the property claimed by them, especially that portion upon which the alleged trespass was committed, by winze and shaft from the surface, perpendicularly down upon this lode, and by tunnels upon the same, connecting with their surface-works, long prior to and at the time respondent acquired any right to this property whatever, if he has any at all.

This presents, under this question, the simple proposition, can a person acquire actual possession of a lode by shafts from the surface and underground works thereon to the extent of such shaft and works? This principle is too clearly determined in the affirmative by the au-

thorities cited by appellants in their original brief in this case to admit of doubt; and is too deeply founded in reason and principle to be overturned. It was emphatically actual possession of the *locus in quo*, which was incapable of being held by adverse claimants at the same time. Should additional authorities than those cited be required to support so plain a proposition, we cite: Washburn on Real Property (4th ed.), p. 125; also p. 128.

Then, if actual possession and occupancy of the property upon which the alleged trespass was committed would defeat a recovery in this kind of an action, and the facts sought to be proven established, or tended to establish, such possession, there was manifest error, and consequently injury in the refusal of the court to allow such proof.

At common law a sale of that portion of the property by Estell and Holland to respondent would not give him a remedy, even in ejectment. It is only by statute that he could recover in that kind of an action. See 1 Wharton on Real Property (4th ed.), pp. 62-3; *id.* p. 329; 1 Doug. (Mich.), 19, 38, 546, 566.

We confidently assert that the refusal of the court to allow appellants to show their actual possession of the property, at the time of the alleged trespass and the beginning of this action, was a fatal error in the trial of this case, and for which account it should be reversed. It was an issue fairly tendered, and was material in the determination of the merits of the controversy.

Upon the question presented under the second subdivision of this brief, it is contended by counsel for respondent that the statute of limitation was not sufficiently pleaded to let in the proof offered. Also, that the *general allegation of ownership* by appellants, and the denial of the title of the respondents, were insufficient for that purpose.

We might here say that the question is of but little consequence, if we are correct upon the first proposition

herein discussed, as it involves directly the right of the plaintiff to recover in this character of action, regardless of any title acquired under the "statute of limitation" by adverse possession, if, indeed, it can be said to be an allegation of title at all. It is a well settled principle of practice and pleading, that, upon a denial of title in plaintiff, defendant may show any title that is available in himself that will defeat a recovery. That, like a plaintiff who avers title in himself, he may show any and all title he may have, whether acquired by adverse possession or otherwise.

1. Was the evidence of title by adverse possession admissible under the denial of title in respondent and averment of ownership by appellants? Upon this point we refer the court to *Keyes v. Cannon*, 29 Ohio St. 359; *Gillespie v. Jones*, 47 Cal. 259. We might cite other authorities upon this point, but, as we take it, none can be found to the contrary when the question legitimately involves one of title.

2d. Did the evidence offered tend to establish such a title in appellants and to disprove title in respondent? If it did, there was error to their injury in its rejection by the court, and the case should be reversed on that account.

Was the evidence offered pertinent, and did it tend to establish adverse possession in the appellants? As shown by the record they sought to show the following facts: That, in 1875, they located the property in controversy; that they marked out the surface boundaries so as that they could be readily traced; that they made a record of it; that they commenced work upon the surface in 1875, and continuously worked upon the same up to the time of the commencement of this action; that prior to the acquisition of any interest of respondent in the same, they had sunk a shaft and winze from the surface to the levels beneath, and connected the same therewith; that the predecessors of respondent knew that they claimed



the property upon which this work was done as their own; that this constituted the trespass complained of, and that they were in the actual possession thereof from 1875 to the commencement of this action; and that they had expended in money and labor thereon about eighteen thousand dollars (\$18,000), while the "Salmon" and "Cliff" lodes belonged to the predecessors in interest of respondents, and about seventeen thousand dollars (\$17,000) since respondent acquired whatever interest he has in the same; and that they were never, at any time, disturbed in the possession thereof until a receiver was appointed in the court below.

Each and all of these facts, separately and collectively, were sought to be established. But the court refused to admit any of them, as will be seen from exceptions contained in the record, from page 107 to 131, inclusive.

We were, at the trial, and still are, utterly unable to see upon what basis this evidence was excluded. If the appellants should have been held to establish a title in connection with their possession notwithstanding their title under the "statute of limitation," we could readily see how evidence of adverse possession would be inadmissible. But when it is clearly shown that, under the issues, such possession gives title or right of possession, even against the true owner, when held for the statutory period, the reasons for its admission are too patent to admit of controversy.

Even if the title to the property so possessed was vested in the predecessors in interest of the respondent in 1875, this is the very fact that sets the statute of limitation in motion, and enables the occupant thus to acquire a right of possession to it. If he had a title or right of possession, aside from this, it would be useless to assert his claim under adverse possession. As it is, he can certainly rely upon either or both. This question of actual possession, under all the circumstances of the case, was a question of fact for the jury, under proper instructions

from the court. It is not like a case where a given state of facts is uncontroverted; here the appellants sought to establish the facts constituting an adverse possession. See *Shuffleton v. Nelson*, 2 Sawyer, 540 *et seq.*; *English v. Johnson*, 17 Cal. 107; Washburn on Real Prop. (4th ed.) vol. 3, pp. 21, 38, 140-41; *id.* pp. 124, 125.

Nor can it make any difference in whom, or in what manner, the legal title is held. Adverse possession for the statutory period constitutes a complete bar and vests the right of possession in the adverse occupant. See Washburn on Real Prop. (4th ed.) vol. 3, p. 134; 2 Black (U. S.), 605 *et seq.*; 43 Cal. pp. 65, 67; *id.* pp. 251, 252.

With respect to this kind of property, respondent and his predecessor had their action to recover possession, and the statute of limitations of the territory ran as well before as after the issuance of the patent. See 420 *Mining Company v. Bullion Mining Company*, 4 Sawyer, 634 *et seq.*; *Sears v. Taylor*, 4 Col. 38; Copp's U. S. Mineral Lands, p. 363 *et seq.*

Hence, if the party entitled to bring his action, or his successor in interest, fails to do so within the statutory period, and afterwards gets a patent, he obtains nothing but the naked legal title, leaving the adverse occupant with the beneficial estate, which he can assert in any form of action necessary for its protection. See *Arrington v. Liscom*, 34 Cal. 381; *Crockett v. Lashbrook*, 17 Am. Dec. p. 98; Codified Statutes, p. 511, sec. 284; *Davis v. Clarke*, 2 Mont. 394 *et seq.*; *Cameron v. Stockton*, 36 Cal. 593.

The *status* of the parties' rights with respect to this property were fixed, under the statute of limitations, at the time of its repeal on the 4th day of August, 1877, under the evidence offered.

The remedy was extinct and could not be revived.

A vested right had accrued which could not be defeated or disposed of, except in some of the modes provided by law. Appellants offered to prove their adverse possession

from June, 1875, to the 23d of August, 1879, which was an effectual bar under all the different statutes applicable.

Upon the third and fourth propositions presented, counsel for respondents seem to assume that, under one of their defenses, which alleges that the Salmon lode proper lies west of appellants' lodes, the only question raised is, at what point is the eastern boundary of the Salmon? In other words, that, in a contest with reference to actual possession, which is the claim of appellants, respondent may *float the actual* possession in an easterly or westerly direction, wherever he pleases; or where, in fact, the boundary would be, and there dispense with appellants' claim and possession. It is clear that appellants relied upon this possession and the boundaries of their claim as limiting the boundaries of the Salmon, and did not intend to surrender it, instead of intending the Salmon to swallow up their claim and possession. It would be a fraud upon appellants to so interpret the pleadings.

Appellants sought to fix this possession and claim in order to show what is meant by the boundary of the "Salmon" on the east. They claim the property they were in possession of, and if it covers a part of the "Salmon" proper, it is equivalent to an assertion that any title respondents may have to it is bounded by the western boundary of their claim. They claim in their answer the precise piece of property which they were in possession of. This possession is the very essence of their claim, and upon it depends respondent's right to recover. If he cannot recover while appellants are in possession, claiming title, he cannot by mere fiction assume that they are in possession of a different piece of property, and thereby dispense with the consequences flowing from such actual possession of the *locus in quo*. This would utterly dispense with actual possession, defeat the running of the "statute" by reason of it, require a party to stand upon a strict legal title, and force him to surrender



the benefit of his actual possession, even though he had acquired a title thereby. The rule is, that, if a party, even through mistake of his boundary lines, or calls of his deed, enter upon the land of his neighbor and occupy it adversely for the statutory period, he acquires a right to possess it.

Hence the whole question is, did appellants occupy the ground, upon which the trespass was alleged to have been committed, under a claim of title? See *Haley v. Wheeler*, 8 Hun, 569; *Grimm v. Curly*, 43 Cal. 252.

Whatever bars an action in trespass may be given in evidence under the general issue; and it can make no difference that several defenses are pleaded. See *Langford v. Ausley*, 4 Am. Dec. p. 699.

The appellants sought to show that their original entry, if it was a trespass at all, was while the predecessors in interest of respondent were in possession as such, and that this was the only entry. The doctrine in such case is well settled, that, as against the true owner or actual occupant under him, neither can have a remedy, except for the first entry; and that he must regain his possession in some way before he can maintain an action of this kind. See *Zell v. Reau*, 31 Penn. 304; *Dimalt v. Hageman*, 8 Cowan, 22 (18 Am. Dec. p. 443); 2 Roll. Abr. "Trespass," p. 5; 4 Cowan, 388, and case there cited (8 Wheat. 75, p. 80).

It would seem too plain to require additional argument or authority, that the refusal of the court to permit appellants to show that they were in the actual possession of a portion of the property at the time respondent acquired his interest and made his entry was error. It is a settled principle, that in such cases, whether he have the perfect legal title or only the right of entry at the time, he acquires possession of such portions only of the property as are not in the actual adverse possession of another at the time of such entry. See *Ayres v. Bensley*, 32 Cal. 620.

The most that could be said in the case at bar is, that

if appellants and respondent were each in the actual possession of a part of the "Salmon" lode, as contended by counsel, the one having the legal title would hold the constructive possession. That is to say, that portion of the appellants' claim, not in his actual possession, for the purpose of this action, would yield to the superior title of respondent, if they had any, and *e converso*. See *Semple v. Cook*, 5 Cal. 26.

The question in this case involves necessarily the fact of actual possession. *Constructive* possession is of no avail in *trespass quare clausum fregit* if the property is at the time in the *actual adverse possession* of another.

If this be true, the whole of respondent's theory is overturned. The question of actual possession was the gist of the action; and the ruling of the court in not permitting it to be shown in contradistinction to the legal title was an error fatal to the trial.

We contend that it is wholly immaterial what inherent defects or infirmity there may be in the calls or the description of the property upon which the entry is made, in so far as it can affect the portion thereof which is reduced to actual possession.

As evidence tending to show that the "Scratch-All" was a cross-vein, appellants sought to prove the formation of the country, the strike or course of the different lodes in the vicinity, and that the formation of the country rock was similar to the so-called vein claimed by respondent, and ran in the same direction with it. This they were not permitted to do. See Record, pp. 104-5.

Upon the question submitted to the jury, as to whether there was a cross-vein, they were unable to make a finding.

If the evidence was competent, the influence it may have had upon the verdict of the jury will not be considered by the court. If it devolved upon appellants to show this fact, as contended for by counsel for respondent, then there was manifestly error in the rejection of

the evidence. If, on the contrary (as we claim), it devolved upon the respondent to show that there was no cross-vein, as affecting his right of recovery in this case, then a failure to find on this point would defeat this action.

It devolves upon him to show that he has a right to recover; that the work in cutting through his lode was a trespass. If it were a cross-vein, as appellants claim, they had a right to work it through the claim of respondent, and his remedy pertains to the recovery of the ore, and not to the trespass upon his possession in taking it out; and such was the effect of the instructions. He must show every fact necessary for a recovery, and, in so doing, it devolved upon him to establish to the satisfaction of the jury that there was no cross-vein where appellants took out the quartz in question. This he failed to do, and in this he failed to show any trespass. It is not requiring him to show a negative except by establishing his right affirmatively.

Besides, the extent of the "Salmon" mine on the east had been fully gone into by the respondent, in order to show the trespass, and the extent of the trespass, alleged to have been committed thereon by appellants. It was directly in issue, and the evidence of Murray, as to the declarations of Holland and Estell upon this point, was of the utmost importance to appellants. By its exclusion a part of the evidence—the declaration of respondent's grantors while in possession as to the boundary line—was not presented to the jury. It also tended to show that the work done by appellants was with the knowledge and consent of Holland and Estell, and consequently no trespass, as pleaded in the answer. See Record, p. 112.

But above and beyond all, as to the errors in the rejection of evidence upon the question of the existence of a cross-vein, we invite the attention of the court to the evidence offered by appellants, as found on page 101 of Record. Int. 21, p. 112; 23, 24, p. 65; 15, p. 65.



Here Durfee, one of the appellants, after showing his knowledge of quartz lodes, and especially those in the district of country in which the property in question was situated, was not allowed to testify to facts showing that there was a "Scratch-All" lode, and that it crossed what is called the "Salmon." We submit that in this there was gross error.

The respondent, having testified as to the existence of the "Salmon" lode and non-existence of the "Scratch-All" lode, was asked whether or not, in his purchase of the "Salmon" lode of Estell and Holland, he recognized the title of appellants to the "Scratch-All" lode. This would, by the declaration and admission of a party in interest, have tended to show the existence of the lode.

We might refer the court to many other particulars wherein competent evidence of the existence of the "Scratch-All" and "Shark Town" lodes were excluded by the court were it not for the prolixity it would necessarily occasion.

What we have said with reference to the importance and admissibility of the testimony tending to show an adverse possession of the property upon which it was alleged the trespass was committed, under the third and fourth subdivisions of this brief, is especially applicable under subdivisions five, six and seven, when taken in connection with the allegations of *adverse possession* set up in the *answers* of appellants. See Record, pp. 10, 11.

Then an actual adverse possession by appellants of the identical property they were working at the time this action was brought is alleged to have commenced in the month of February, A. D. 1875.

We do not think it necessary to further discuss this proposition, and shall rest contented with a brief reference to the principal point made by counsel in their written argument, which we will consider in connection with the eighth subdivision.

It is claimed that the entry of the appellants as against Holland and Estell was clandestine, and that they had neither the knowledge nor the means of knowledge of the *locus in quo* upon which appellants were at work. In answer to this, it will be seen by bill of exceptions, on record, pp. 111-12, and the allegation of the answer, pp. 11 and 12, that appellants averred and sought to show that Holland and Estell had actual knowledge of the claim and works of appellants. The respondent's counsel, in this respect, place themselves in the untenable attitude of objecting to the admission of the evidence tending to show these facts, and, after its exclusion at their instance, complaining of appellants for not making the necessary proof. The rule in such cases, we take it, would at least require that the complaining party should admit the facts sought to be established. We do not deem it necessary to cite authorities upon the admissibility of this evidence when a statute so unequivocal in its terms has declared it competent.

But it is contended that the evidence of Holland and Estell was offered under section 603 of the Civil Practice Act, and was properly excluded by the court for the reason that the party offering it declined to further state the purpose for which it was sought to be introduced. The section referred to provides: "When, however, one derives title to real property from another, the *declaration*, acts or *omissions* of the latter, while holding the title, in relation to the property, is evidence against the former."

Counsel states to the court that this evidence was offered for all legitimate purposes under the issues joined and the section of the statute above quoted. We think it too clear to admit of argument or to require the citation of authority, that, if this evidence was admissible upon any branch of the case, it should have gone to the jury, and its bearing have been limited by instruction, if any limitations were necessary. There was an issue of

title and adverse possession directly tendered, under either of which, aside from the statute, it was competent.

We confidently submit that the record, from pages 5 to 131, inclusive, is replete with errors, as disclosed by the bills of exception of appellants; that manifest injury resulted from them, and that the case should be reversed.

Having considered the question of the admissibility of the evidence offered as fully as a due regard for the length of this argument would at all admit of, we shall now briefly recur to some of the other points made by counsel for respondent.

It is contended that the respondent was in possession of the ground at the surface, and that the jury so found. Counsel seems to overlook the fact disclosed by the record that appellants sought to show their location of the "Shark Town" across the "Salmon" at or nearly at a right angle; and that they were in possession of the surface ground and had sunk a shaft and winze perpendicularly upon their tunnel and levels beneath. The first effort in the defense was to show a staking off of this location of the surface in the manner prescribed by law. It might well have been expected, that, if the adverse occupancy of this property by defendants were excluded from the jury, under the instructions of the court, they would have found actual possession in the respondent, which would otherwise have been merely constructive, if it were found he had any at all. We have heretofore called the court's attention to the record showing the exclusion of the evidence upon this point, and shall not again refer to it.

But in anticipation of the error of the court in not permitting appellants to show title by adverse possession, under the statute of the territory, it is claimed that no such right can be acquired, as that would interfere with the primary disposal of the soil, which is exclusively within the province of the congress of the United States.

This position cannot successfully be maintained. In



agricultural entries the statute does not begin to run before the emanation of the patent. But no one would claim that it is not effectual as a bar *ex post facto* to the patent.

The patent, it is true, under the doctrine of "relation," confers upon the patentee whatever title he acquired by the grant, in the first instance, under his location. Yet in the meantime he may have parted with this right by deed, or lost it by adverse possession of another. In such case the patent is but the empty evidence of a once perfect title, the efficacy of which is lost by the investiture of the beneficial estate in another.

Respondent could not enter the land in 1873, permit it to be held adversely by another during the statutory period of limitation, refuse to pursue his remedy to recover possession of the property, and thereafter make his patent available for such purpose.

After he has lost his right of possession in some of the modes known to the law, by neglecting to avail himself of his grant and remedy afforded him on account of it, he cannot call to his relief the patent which issues after the right it confers by relation had become extinct. It will afford him no support.

The government has given him a right and a remedy, which is all that it has assumed to do. The authorities we have cited show conclusively that the "statutes of limitation" may be set in motion and are an effectual bar, as well before as after patent, when applied to this particular class of property.

In this connection counsel has also much to say about the "Salmon" lode, or vein, and speaks of it as a fixed fact.

The mass of country rock claimed to have been cut by appellants, they sought to show by an expert especially acquainted with the formation of the country at and in the vicinity of the property in question, that what the respondent calls the "Salmon" lode is no lode at all, but

is the general and universal formation of the country rock as it runs in that direction. See Record, pp. 104, 105, 109, int. 39.

Besides, under the instructions given at the request of counsel for respondent, and the evidence in the case, the jury might well find a lode, in the sense used in the instruction, two miles instead of one-quarter of a mile in width.

The respondent had testified to his possession of the *locus in quo*; it was a question submitted to the jury, and upon which instructions were given; and upon which counsel now claims that there is a finding in his favor.

As will be seen from the record, p. 116, appellants were not permitted to use in evidence the complaint sworn to by respondent, wherein he states that the appellants were in possession, and charges in direct terms a disseizin. This was a link in the chain of evidence.

As all the testimony went to show that, at and from that date, appellants' possession was unchanged, it was competent as an admission.

For a full and thorough presentation of the errors assigned, in the rejection and admission of evidence on the trial, other than those referred to, we respectfully submit to the attention of the court the latter portion of the original brief on file, prepared by Mr. Robinson while of counsel for appellants in this case.

As counsel for respondent take issue upon those questions by a general denial of error, we leave them as they stand, for the consideration of the court.

In discussing the errors assigned, in giving the volume of instructions, offered by respondents, we are very much at a loss to know where or how to begin.

We earnestly protest against the whole theory announced in them, as tending to mystify the real issue in the case and mislead the jury. They are altogether too broad and uncertain in the definition of a lode and lode matters, as contemplated by the statute, and seem to have

been intended to uphold some of the visionary theories of the witness upon the stand for the plaintiff, so as to comprise the entire formation of the country from the primitive granite on the east to the primitive granite on the west.

Taking these instructions as a body, we assert that the jury would be justified in finding that a quarry of limestone, granite, or anything else within the bowels of the earth, would satisfy the demands of the law under a location of a gold or silver ledge, *i. e.*, any material that is incapable of supporting animal or vegetable life, is all that is required.

The jury were told that if the zone or section of country claimed by respondent was mineral in its character, he was entitled to recover so far as that question was concerned, and that "mineral was anything that was incapable of supporting either animal or vegetable life." As a sample, see instructions contained on pp. 152, 153, of record, Nos. 26-7.

It will be conceded that instructions which tend to mislead the jury present good grounds for a reversal of the case.

The twenty-eighth instruction is equally obnoxious, for a like reason. We insist upon the objections specifically pointed out in bill of exceptions in record, p. —, and shall not attempt further here to discuss them.

In conclusion, we respectfully submit that the rejection of the evidence of the *actual possession* of the *locus in quo* by appellants, prior to respondent's purchase, prior to the alleged trespass, and up to and at the time of the institution of this action, present errors that cannot be frittered away without invading legal principle and doing violence to private right. 1. Because the evidence tends to show a "disseizin" of respondent with respect to the *locus in quo*, and thereby affecting his right of recovery in the action. 2. Because it tended to establish an adverse possession in appellants under a



*bona fide* claim of title, and was an element of title. 3. Because it tended to establish a title by adverse possession, and was competent for all three of these purposes.

In this we contend there was certainly error. If so, the case should be reversed, aside from the various other questions discussed by counsel for the respective parties.

There is much in the transcript of this case that tends to incumber the record and is of no consequence to either party, as no question is made as to the sufficiency of the evidence and no motion for a new trial was made. All that we conceive material in the determination of the points presented will be found on the first 178 pages, and 401 to 410, inclusive, of the record. These, we believe, will include all the questions involved, embracing the claim and the objections to it, as well as the insufficiency of the verdict and findings to support it.

HIRAM KNOWLES, THOS. L. NAPTON and SANDERS & CULLEN, for respondents.

It is true that, upon information and belief, defendants deny plaintiff's possession of the Salmon and Cliff Extension No. 2 mine. It is not true that defendants anywhere set up title or possession, or right of possession, of the same. For verification of this, see page 8 of transcript, wherein defendants deny that they, either by themselves or in connection with any one else, entered into the possession of the Salmon and Cliff-Extension No. 2 mine. To the same effect is the answer of Merill and Schnepple. See page 15 of transcript. By reference to page 10 of transcript, it will be seen that defendants claim that they own the Scratch-All and Shark Town lodes. That the said Shark Town lies east and adjoining the Salmon and Cliff-Extension lodes, and that the Scratch-All lies and extends across the said Salmon and Cliff lodes at nearly right angles. But they aver that they have never worked or mined within the limits or

boundaries of the said Salmon and Cliff mine or any part thereof. To defendants' answer to plaintiff's supplemental complaint, defendants set up that they located and have been in possession of the ground in controversy. This answer cuts very little figure, however, in the case, as the supplemental complaint was only set forth with a view of affecting the equitable relief asked by plaintiff. It should be observed, however, that in no answer by any of the defendants is it set forth that they have been in possession of any portion of the said Salmon and Cliff mine. On the other hand, it is always alleged that they have been working a different lode, namely, the Scratch-All or the Shark Town. In plaintiff's replication, he admits that defendants have never worked within the external boundaries of the Salmon and Cliff mine, but avers that they have worked upon the same beneath the surface. See page 25 of transcript. This shows what the controversy was. The plaintiffs claimed that the defendants were on the Salmon and Cliff mine. Defendants denied this, but averred that they were on the Scratch-All or Shark Town lode. The question presented was identity of lodes. On page 275 of transcript, from the evidence of Harry Showers, it will be seen that the shaft of Murray and Durfee was outside of the Salmon lines. See, to same effect, evidence of Pardee, page 247 of transcript, and of Foote, page 201 of transcript. This shaft was east of the Salmon and Cliff. See evidence of Showers, page 276 of transcript. All of the evidence as to the location of the *locus in quo* shows this. The dip of the Salmon is about forty-five degrees east. See evidence, pages 208, 209, 226, 285 of transcript. This was the state of the case. The defendants went outside of the side lines of the said Salmon and Cliff to the east, and sunk a perpendicular shaft. The jury found that this shaft entered the Salmon and Cliff mine, and that the works thereupon were in it. See pages 401 and 404 of transcript. The finding of a general verdict for plaintiff

found this. That was the issue presented in the pleadings. As the jury found this as a matter of fact, it cannot be reviewed now in this case as presented.

The defendants, however, now turn around and say: "Admit we were upon the Salmon and Cliff vein; we had been there so long that the statute of limitations had run against plaintiff." There is no pretense by the defendants in their pleadings or in their evidence that they were ever in the possession of any of the external surface ground of the Salmon and Cliff. They must admit, then, if they have been in possession of the Salmon and Cliff lode, they acquired this possession by digging subterraneously into the same. And the question is presented to the court, can a person acquire possession of a vein by digging into it subterraneously?

The first question would be, what does he acquire possession of? Just to the extent of the excavations he may make in the same? This is changing as he advances in his burrowing daily. How would such a possession be described in an action of ejectment? What would be its metes and bounds? Such a possession has no legal subdivisions. The plaintiff was in possession of this ground at the surface. There is no doubt about this. The jury found he was in possession. See page 404 of transcript. All of the evidence shows this. Possession of land is *prima facie* evidence of ownership. *Doran v. C. P. R. R. Co.* 24 Cal. 245; *Grover v. Hawley*, 5 Cal. 485; *Crandle v. Woods*, 8 Cal. 136. The rule of the common law was that he who owns the surface owns to the heavens above and the depths beneath. Blackstone's Com. vol. 1, book 2, p. 18; Washburn on Real Estate, vol. 1, p. 3.

Under our mining law the title and right of possession follows a vein on its dip downward to the depths below. See sec. 2322, R. S. U. S. See the patent in evidence in this case, pp. 191-2 of transcript.

It is claimed that Pardee's possession was only a naked



possession. This is not true. He was placed in possession by Holland and Estell, the owners of the lode. See evidence of Pardee, p. 237 of transcript; Evidence of Holland, p. 235 of transcript; Evidence of Estell, p. 226 of transcript. Thus he became the tenant of Holland and Estell. 1 Washb. on Real Prop. sec. 26, p. 591; *Yellow Jacket Co. v. Stevens*, 5 Nev. 184, marg. p. 232; Kent's Com. vol. 4, 111; Wait's Act. & Def. vol. 4, 188-205; Wait's Act. & Def. vol. 3, p. 48, and cases cited; *Clark v. Minnis*, 50 Cal. 508; *Leamond v. Hudson*, 60 N. Y. 102.

The fact that no rent was specified makes no difference. *Hunt v. Comstock*, 15 Wend. 665. The plaintiff's possession was that of his lessors. *Mecham v. McKay*, 37 Cal. 155. And for the time he held the relation of tenant he was to that extent the owner of the premises. 1 Washb. on Real Prop. 436-7. He can justify under whatever title his grantors may have. He is like any other grantee; he traces his rights and title to the source from whence they came. This is a familiar rule. A grantee is not confined to his own deed, but can trace title back to its source. For this purpose the introduction in evidence of the patent to Holland and Estell was proper. It showed that the title of Holland and Estell was a patent from the United States, the paramount source of all titles to mines, and this shows the character of plaintiff's possession. It was backed by a government title. This became material when the defendants claim by adverse possession. They have invoked the aid of the provisions of the statute of limitations as provided in chapter 80 of the Codified Laws of 1871-2, p. 595.

*First.* This statute applies only to mining claims. The language used, to which the law applies, is mining claims. A mining claim is the right or title persons acquire by location. *Hale & Norcross Gold & S. M. Co. v. Story et al.* 1 Nev. 104; *State of Nevada v. Real Del Monte G. & S. M. Co.* 1 Nev. 524. The plaintiff, having the right

to trace back his rights to that of his grantors, Holland and Estell, had a very different title to that acquired by location. The only time when the statute of limitations could have run was between the years 1875 and 1877. The statute invoked by defendants was repealed. See Laws of Montana of 1877, p. 215, sec. 674, and p. 48, sec. 40. This is a lode claim. In this last act, lode claims are excepted.

During this time Holland and Estell held the ground by virtue of an equitable title from the government. From the patent on page 182 of transcript, it will be seen that Holland and Estell entered and paid for said mine on the 24th day of April, A. D. 1873. This gave them at least an equitable title. As far as the government was concerned they were in the same position as though they had a patent. *Barney v. Dolph*, 97 U. S. 656; *Simmons v. Wagner*, 101 U. S. 261.

When the patent issued to them, it related back to the date when the equitable right accrued. *Stark v. Starrs*, 6 Wall. 418; *Wirth v. Branson*, 98 U. S. 121.

The right that Holland and Estell had was a very different right from that which a locator of mining ground holds. But if the statute could be construed to apply to such a right as that of Holland and Estell, then it was void in that particular. The legislative authority of the territory cannot interfere with the primary disposal of the soil. Organic Act of Montana, sec. 6.

Such a statute as this would have that bearing. See *Gibson v. Choteau*, 13 Wall. 92; *Schneffleton v. Nelson*, 2 Sawyer, 540.

But if it did in terms apply to such a title, the possession of defendants was not sufficient to set the statute of limitations in motion. To constitute adverse possession, the occupation must be open, visible, notorious and exclusive under a claim of right to hold the land against him who was seized, and the person against whom it is held must have knowledge or the means of knowledge

of such occupation. A clandestine entry or possession will not set the statute in motion. *Thompson v. Pioche*, 44 Cal. 517.

How can it be said that defendants' occupation was open or visible, or notorious, when they went inside of the side lines of plaintiff, and dug subterraneously into the Salmon and Cliff mine? How can it be said to be exclusive when the grantors of plaintiff were in possession of the surface, if not actually all the time, still all the time by virtue of their title? How can the defendants claim that they held the Salmon and Cliff ground under a claim of right, when they all the time denied that they were on this ground; and under the circumstances, how could it be against him who was seized? Did Holland and Estell have knowledge, or the means of knowledge, that defendants were on their mine? The works of Holland and Estell and those of Murray and Durfee were not joined or connected until after Pardee obtained possession of the same. See evidence of Showers, pp. 270 and 271 of transcript; also p. 227 of transcript. How could they have any means of knowledge positively that Murray and Durfee were on the Salmon mine until this connection was made?

Again, was this not a clandestine entry? Defendants went outside of the side lines of plaintiff and dug into the property, and they all the time claimed that they were on a separate lead, and not on the Salmon vein; that they were upon a cross-lead. If the defendants did not plead the statute of limitations; or if the evidence they offered was not competent to show that the defendants had been in adverse possession of the premises; or if the statute was void as far as it would have affected this case, then the numerous exceptions that defendants have taken upon this point must fall to the ground. Under plaintiff's possession he could maintain this action of trespass. 1 Washb. on Real



Prop. sec. 6584; 1 Chitty on Pl. 176; Cooley on Torts, 322; *Mining Co. v. Torbit*, 8 Otto.

Between plaintiff and defendants there was no privity of estate in any way. Defendants were strangers then. See Bouvier's Law Dictionary, title "Stranger;" Burrill's Law Dictionary, title "Stranger." To the extent of the term for which plaintiff held this property he was the owner. 1 Washb. on Real Prop. 535.

Even if this was not mining property, the mine being opened, he would have the right to mine the same. 1 Washb. on Real Prop. 467; *Freer v. Shotenbar*, 36 Barb. 641.

There was no error in the court refusing to allow defendants to prove the location of Scratch-All and Shark Town lodes. The only object in introducing this was to show that they were the owners of, and possessed of, these mines. This they allege in their answer. See p. 10 of transcript. The replication of plaintiff does not deny this. Hence it is admitted. See Statutes of 1877, p. 65, sec. 107.

It will be seen from a consideration of this trial that it was all the time conceded that defendants were the owners of the Scratch-All lode, if there was any, and the question for the jury was whether they were on this lode or the Salmon. And it was conceded that, if they were mining on either the Scratch-All lode or Shark Town lode, they were not trespassers. The only object the defendants could have had in attempting to show that they had been in possession of the Salmon mine would be to show that they had held the same adversely. If they had offered no evidence to show that the statute of limitations would apply, then there was no error in rejecting this. The defendants seems to claim some exemption from the ordinary rule that a man cannot acquire the possession of ground by going outside of the surface of the same, and digging into the same subterraneously, be-

cause they sunk their shaft down from an adjoining claim perpendicularly and struck the Salmon on its dip. They do not claim that they ever entered upon the Salmon surface ground. By virtue of the Revised Statutes of the United States, sec. 2322, the owners of the Salmon mine had the right to the possession of all the surface included in their lines of location, and of all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside such surface lines, extending downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. What difference is this right to that an owner of land has beneath his surface? Can it be that the plaintiff, although in possession of the surface of the Salmon mine, possessed nothing below the surface?

Again, as far as the surface ground that defendants claimed outside of the lines of the Salmon, the plaintiff or his grantors never made any claim to this; and how could they have brought an action against defendants to recover possession of any portion of the Salmon mine upon which the defendants entered? They could not describe such possession, if defendants had any, but as a hole in the ground. As to the surface outside of the Salmon they were in rightful possession, and, so far as their shaft extended before it struck the Salmon vein, they would be rightfully in possession of that.

The defendants further seek to recover on the theory that there was a cross-vein, namely, the Scratch-All, and that they were in possession of the surface of this, and hence in possession of it all the way down.

The question was asked the jury as to whether there was such a vein as the Scratch-All, running east and west. And the jury answer: "From the body of ore exposed westerly from the turn-table, there may be a Scratch-All, or a vein connecting closely with contact

vein from west." See page 403 of transcript. Now the works of defendants, when they were seeking to show possession, were east of the contact, and here the jury found no evidence of a cross-vein, and as to the one west they were simply uncertain. But admitting that there was a cross-vein, when it intersected with the Salmon it became in effect a part of the Salmon. See R. S. U. S. sec. 2336.

What is meant by priority of title shall govern? Why, he who holds the older title shall hold not alone the vein, but all the ground in the space of intersection, including the ore in the cross-vein. It cannot be that all the prior locator gets is the ore of the cross-vein in the intersection, and that the subsequent locator gets any of the ground in the space of intersection. The last clause shows that this could not have been the intention, for the subsequent locator gets only the right of way through the ground of the prior locator. But there is another consideration. If the Scratch-All was a cross-vein, then, as far as it lay within the lines of the Salmon, was not the plaintiff possessed of it at the surface, and was not the entering upon it an invasion of this possession?

Again, if there was a cross-vein known as the Scratch-All, then outside of the surface ground of the Salmon the defendants had the right to work and possess the same down until it struck the Salmon vein; and if possession of their vein from the surface down gave adverse possession, then plaintiff would be powerless. He could bring no action to eject him from his surface possession, and it would be only a question of time when this adverse possession would ripen into title.

The appellants aver that it devolved upon plaintiff to prove there was no cross-vein. That would be requiring him to prove a negative. That all that should be required of defendants would be to allege they claimed by virtue of a cross-vein, and it would devolve upon the plaintiff to disprove this. He who alleges a fact must prove it.



If defendants claim by virtue of a cross-vein, they should prove it. It is the foundation of the right they claim.

What possible legal presumption could arise from showing that all the veins in that mining district ran in a different direction from that of the Salmon? It is a well-known fact that all the veins in a district do not run in the same direction. A majority may, but not all. If all the veins in a district ran one way, when would arise the rules as to cross-veins? The statutes themselves recognize the fact that there may be different directions to veins in the same locality. Suppose it should be proven that all the veins in a district ran one way but one, and here was a well-defined lead running at right angles with all the rest; would the fact that all the other veins ran the other way disprove this patent fact? Yet that is what defendants wished to do.

The court held correctly that defendants, before they could prove adverse possession of the Salmon, would have to prove that they had been in the possession of the same at the surface. This the defendants never proposed to prove, and hence the court refused to allow them to prove that they had acquired possession of the Salmon mine by burrowing into it clandestinely. He allowed them to introduce any evidence that would show they ever were on the Salmon mine.

Defendants were seeking to prove adverse possession. The fact that plaintiff may have admitted that at a certain time defendants had made a forcible entry upon the subterraneous part of the Salmon mine or any part of it would not show that they had held it for the requisite period.

Nor would the insertion in the declaration in such an action as forcible entry and unlawful detainer, of an averment that defendants, at a certain time, had taken forcible possession of the Salmon mine, go to show, as a matter of fact, that plaintiff was not in possession of said mine when he brought the action in this case. The

trespass alleged and the time when plaintiff was in possession was on the 9th day of August; the time when plaintiff alleges the forcible entry was the 18th day of August, nine days after the alleged trespass in this case.

There were no allegations of the answer showing that defendants had ever claimed any adverse possession of the Salmon mine, or that they were in possession of the same. They denied at all times that they were in the possession. This proof, then, did not support any of the allegations of the answer. They wished to prove by an admission of plaintiffs what in their answer they had denied as the fact.

The court committed no error in allowing plaintiff to prove the judgment, etc., and appointment of receiver in the case of *Schneple v. Murray and Durfee*. Schneple denied that he had entered the Salmon mine. It was proven that Merrill had. He was a receiver in that case, and the object was to connect him with Merrill, the same that a plaintiff in an action in which an attachment is issued may be connected with the officer who serves the writ.

As to the point that the court would not let the defendants prove that they were in possession of the Salmon mine, the answer is that it is not true. The court never at any time refused to allow defendants to prove this. The dispute here was this: The defendants claimed that they could acquire the possession of the property by digging into it subterraneously without having the possession of the surface, when plaintiff's grantors were in possession thereof. The court held otherwise. If the defendants could acquire the possession of real property in this way, then the court committed error; if not, then the court was correct. And if this court should entertain for a moment the notion that upon this point the court below committed error, then I would like to know of what they gained possession; of what portion of the mine did they gain possession? the whole mine? Did

they oust the possessor on the surface in this way? Did they have the possession of the whole mine below their levels? How can this be? If the plaintiff does not have possession of the whole mine by being possessed of it at the surface, then the defendants can have no possession of the mine farther than they have entered their works.

It is not controverted that the plaintiff could not maintain this action if he was not in possession of the property. The jury have found that he was. And he certainly was, unless possession of property can be obtained by subterraneous digging into real property. The defendants do not pretend that they were in possession of any of the surface of the Salmon mine, yet, because they had dug into the mine subterraneously, that therefore they were in possession of the same, and the plaintiff could not bring this action because he was not in possession of the same. Yet there was no dispute but that the plaintiff was in the actual possession at the surface when this suit was commenced, when the evidence is viewed. This would present a peculiar phase, with the view of defendants. The subterraneous possessor would have in fact ousted the surface possessor, and left him no possession at all that could be protected in a court.

The court did not err in excluding evidence as to the location of the Scratch-All mine, or as to its existence, for this reason: The question was whether or not defendants were working on the Salmon mine. If they were not working on the Salmon mine, it did not make any difference where they were working, whether on the Scratch-All, Shark Town, or Jack Rabbit. Plaintiff claimed possession of nothing but the Salmon and Cliff Extension mine; claimed only that defendants had entered this. It made no difference where else, as far as this action was concerned, defendants had entered or worked.

The court did not err in sustaining plaintiff's objec-



tion to the question in plaintiff's twenty-fourth exception.

1st. There was no allegation that defendants had been in possession of ground for five years before the commencement of the action. If the object was to prove the running of the statute of limitations, then the question covered too much ground. It was not from the time of the commencement of the action, but from the time of the asking of the question.

2d. The question pertained to a portion of the mine *below* the surface, and *not* the surface.

3d. The statute of limitations was not pleaded, and if it was, did not apply. The court properly excluded the evidence sought to be introduced in the twenty-ninth, thirtieth, thirty-first, thirty-second and thirty-third exceptions, for reasons heretofore stated. It made no difference how many cross-leads there were in the district. Were the defendants working on the Salmon lode? was the question.

The point presented upon defendants' thirty-fifth exception has heretofore been presented, and the court did not err.

The court did not err in not permitting Murray to answer the questions in defendants' thirty-ninth and fortieth exceptions. Questions were leading.

The court did not err in not permitting defendants to prove matters contained in their forty-first, forty-second and forty-third exceptions. It made no difference as to what they did, as to staking the Scratch-All lode, or in locating the same.

The court did not err in excluding the testimony offered, and as contained in the forty-fourth exception or in their forty-fifth exception. No estoppel was pleaded. This was the only object of introducing this evidence.

The court did not err in not permitting defendants' witness, Clark, to answer the question contained in their forty-sixth exception. The question was leading and

was otherwise objectionable. If he had answered "No," he would have expressed an opinion against a known fact.

The court did not err in refusing to allow defendants to introduce in evidence the sworn complaint of plaintiff in justice's court, for reasons already stated.

The court did not err in not permitting defendants to prove the matter sought to be proved, as contained in their fifty-third exception. Court had a right to know the object of the testimony.

The court did not err in giving that part of plaintiff's fifth instruction beginning on line 10, p. 143. This is the rule expressed in the case of *Mining Co. v. Torbit*, 8 Otto, 463.

The court did not err in giving plaintiff's tenth instruction. The court takes judicial notice of the facts established by science. See Statutes of Mont. 1879, title "Evidence," sec. 625; Wharton on Ev. secs. 333-336; Greenleaf on Ev. sec. 6, notes 5 and 6.

The court did not err in giving plaintiff's fifteenth instruction. It does not tell the jury to discard expert testimony. It only instructs the jury as to their province in weighing it.

We do not think it is necessary to discuss the other points made by appellants in their brief. In the main, they do not, in our judgment, present facts. It is always difficult to discuss a proposition affirmed positively as true, when no reason is assigned and no authority is invoked to sustain it. If an instruction is misleading, it should be shown how it was misleading.

As to the instructions refused, asked by defendants, we assert that they were properly refused. There was no issue of adverse possession in this case. In the first place, adverse possession was nowhere correctly pleaded. And in the second place, the statute of limitations evoked in this case by defendants did not apply, as we have shown before.

The adverse possession pleaded in the answer to plaintiff's supplemental complaint does not state that they had been in the adverse possession of any of the ground described in said supplemental complaint, but only of the ground in controversy, and this is not described. This is not the kind of a pleading that will show adverse possession. *Abbott's Trial Ev.* 715; 2 *Greenl. Ev. sec.* 430.

WADE, C. J. This controversy, as shown by the pleadings and testimony, arose over the identity of certain quartz lodes, the plaintiff claiming the possession of the Salmon and Cliff Extension lode claims, situate near Phillipsburg, Deer Lodge county, he being the lessee of Holland and Estell, who purchased the claims in 1873, and after the commencement of this action received a government patent therefor; and the defendants basing their right upon their location and possession of the Shark Town and Scratch-All claims. The answer of defendants denies the possession of plaintiff, but the testimony conclusively shows, and without question or dispute, so far as the same appears in the transcript, that the plaintiff, at the time of the grievances complained of, was, and that for a long time prior thereto his lessors had been, in possession of the surface ground of the Salmon and Cliff lode claims. The answer also denies that the defendants ever entered upon the Salmon and Cliff claims, or that they ever mined within the limits thereof, and avers that ever since the 9th day of February, 1875, they have been in possession of and working the Shark Town and Scratch-All claims, and therefore alleges that plaintiff's action is barred by the statute of limitations of February 9, 1865, and January 11, 1872.

The replication of plaintiff admits the location of the Shark Town and Scratch-All claims, but alleges that the defendants, since the 9th day of February, 1875, have been working on the Salmon and Cliff Extension. The location of the Shark Town and Scratch-All claims was



not in question. There was no controversy concerning them and could have been none. Their location was admitted in the pleadings, and any testimony concerning such location was properly excluded from the evidence.

This seems to be the state of facts in the case. The defendants entered upon their own grounds, and outside the surface boundaries of the plaintiff's claim, and sunk a perpendicular shaft and struck a vein of quartz beneath the surface; and the question at issue was whether this vein belonged to, and formed a part of, the Salmon and Cliff Extension lode, and upon this issue the jury found for the plaintiff, and that it did. Upon this issue, testimony as to when defendants commenced upon their claims, or under what claim of title, or how much money they had expended thereon, or when they first commenced work, was wholly immaterial after the admission in the pleadings of the location of their claims. Nor would it have been competent to have proved the declarations of Holland and Estell, lessors of plaintiff, as to the extent or limits of the Salmon and Cliff vein, providing the extent and limits of the same, at the time they made any declarations, because of want of development, were entirely unknown. Such declarations at such a time could have been nothing more than mere speculation, and wholly incompetent for the purpose for which they were offered. Neither would the opinion of the respondent in 1876 as to the location of the Scratch-All claim, or the opinion of any witness as to the dip or direction of the ore in any other veins, make any difference.

The possession of the respondent was sufficient to maintain this action. He had possession of the surface ground, and such possession gave him possession of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their

course downward as to extend outside the vertical side lines of the surface location. U. S. R. S. sec. 2320.

Possession of the surface of a mining claim location is possession of all veins, lodes and ledges, the tops or apexes of which are inside the surface lines, although such veins, lodes and ledges, as they go downward, may extend outside such surface lines; and possession of the surface ground protects such veins, lodes and ledges from the operation of the statute of limitation. Therefore, before the defendants could set up any adverse claim to the Salmon and Cliff Extension vein, they ought to have shown that they were in possession of the same at the surface. No adverse possession could become operative by going outside of its boundaries and sinking a shaft upon what they claimed as another location, and striking the Salmon and Cliff Extension vein on its dip, and outside of its surface lines, no matter how long continued, if unknown to the respondent and his lessors. In such a case the statute would begin to run only from the time it became known to the Salmon and Cliff owners, their predecessors or assignees, that the defendants had entered into the possession of the vein under ground and outside of its surface boundaries. Such owners would have no right to enter upon the defendants' ground or into their shaft or works, and, therefore, no means of knowing the extent of the defendants' possession, or what titles they might be claiming by virtue thereof. Adverse possession, in order to ripen into a title, must be open, notorious, and under a claim of right. The defendants set up no claim to the Salmon and Cliff Extension. They deny that they ever worked upon the same. They claim title by virtue of the Sharktown and the Scratch-All locations, and allege that all their work was done upon such locations. They therefore can claim nothing by virtue of adverse possession of the Salmon and Cliff Extension. They declare that they held no such possession and claim no interest in that vein. Under these

averments in their answers they can claim nothing by adverse possession. Their pleading must not be contradictory or inconsistent. Their testimony must not contradict their averments. After having denied in their answers that they ever had possession of the Salmon and Cliff Extension lode, it was no error for the court to refuse to admit testimony in their behalf that they had taken forcible possession thereof.

If, under the state of circumstances disclosed in this case, the defendants might have availed themselves of the statute of limitation, they have not so pleaded the same as to become entitled to the benefits thereof. They claim under the statutes of February, 1865, and January, 1872, which were repealed by the act of February 16, 1877.

The defendants also claim by virtue of a cross-vein. All competent testimony on this issue seems to have been fairly submitted to the jury. In such a case, priority of title governs, and the prior location is entitled to all the ore or mineral contained within the space of intersection, but the subsequent location has the right of way through the space of intersection for the purpose of the convenient working of the mine. U. S. R. S. sec. 2336.

If a vein with a prior location crossed another, such vein would not disturb the possession of the subsequent location, except as to the extent of the cross-vein, and would entitle the prior location to the ore and mineral contained in the space of intersection. If with a subsequent location, the locator would be entitled only to a right of way to the extent of his cross-vein, for the purpose of working his mine, and to no other right; and if he should take the ore contained in the space of intersection he would be a trespasser, against whom the prior locator in possession of the surface ground might maintain an action of trespass.

The judgment is affirmed, with costs.

*Judgment affirmed.*



CORNELIUS HEDGES, respondent, v. COUNTY COMMISSIONERS OF LEWIS AND CLARKE COUNTY, appellant.

**FEES OF PROBATE JUDGES.**—The act of May 3, 1873, provided for fees of probate judges in matters of probate jurisdiction, and further provided that "for all civil cases, and other than probate matters, the same fees as are allowed to clerks of the district court in similar cases." *Held*, that the fees provided by act of January 12, 1872, for clerks of the district court, became part of the fees of probate judges for all cases "other than probate matters," and such fees were not abolished by the act of February 21, 1879, substituting a salary for fees as compensation of clerks of district court. Fees in criminal cases, though not specifically mentioned, are necessarily included in that provision for cases *other than probate matters*, and were such as by the act of January 12, 1872, were provided for clerks of the district court. No other construction gives consistent force to all the language of the statute.

**COUNTY COMMISSIONERS CANNOT EXERCISE JUDICIAL POWERS — *Certifying probable cause.***—The act of February 13, 1874, which confers on county commissioners the power to disallow any bill of costs in cases whose prosecution they might judge was not required by the public welfare, must be construed in connection with sec. 410 of the Criminal Practice Act, which provides that in cases less than felony, where defendant is discharged, the costs shall be taxed to the prosecution, or person on whose oath the action shall have been instituted, unless the officer trying the case shall certify that there was probable cause, in which event they shall be paid by the county where the offense was committed. This certificate of probable cause is a judicial act, and can only be reviewed by judicial authority. County commissioners have no such judicial powers, nor by the organic act can the legislature confer such powers upon them.

*Appeal from Third District, Lewis and Clarke County.*

T. J. LOWREY, Attorney General, for appellants.

The transcript shows, and it is conceded, that this action was based upon a demand made by Cornelius Hedges, then probate judge of Lewis and Clarke county, against said county for services as probate judge in seventeen criminal cases tried or "heard" between August 4 and December 15, 1880, amounting, as claimed, to \$348. Of this claim the county commissioners allowed and paid

\$51, being \$3 for each trial, and disallowed the balance, \$297. From this order disallowing \$297, Judge Hedges appealed to the district court. The district court, on the face of the papers, entered a judgment for the appellant, requiring the commissioners to pay the additional \$297 and costs, from which judgment this appeal is taken.

It is to be borne in mind that the commissioners have allowed and paid the seventeen items of \$3 each for trial of these cases, usually charged in the bill as "hearing, \$3."

I submit the following propositions as true:

There is not, nor was there at the time the account and claim accrued, any law whatever authorizing the probate judge or clerk, or both, or either of them, to receive any compensation in criminal cases of any character, from either defendant, complaining witness nor the county, except the sum of \$3 for trying each case. The only fee bill then or now in force relating to probate courts and clerks was the act of May 3, 1873, R. S. pp. 532-3, sec. 588 (erroneously noted as May 3, 1874), which says: "The probate courts shall receive the following fees, in probate matters." (Here is inserted a long list of such fees.) Solemnizing marriages, ten dollars; *for all civil cases and other than probate matters* the same fees as are allowed to clerks of district courts, in similar cases; for trying each case, three dollars.

I ask this court to observe the form and punctuation of this sentence, and say what its grammatical English meaning is.

I contend that the words as they stand, "for all civil cases" and "other than probate matters" the same fees, etc., mean no more than they say — civil cases as contradistinguished from criminal cases. To enable the probate court to resort to the district clerk's fee bill, in any given case, it must be not only a civil case, but also it must not be a probate case, already provided for. If the legislature intended it to cover criminal cases, they would not

have said civil cases, or would have used the word "or" instead of "and."

This sentence merely authorizes the probate judge or clerk to tax costs in cases arising within the jurisdiction against litigants in civil actions. Previous to this act of February 13, 1873, probate judges were entitled to no fees in criminal cases. See fee bill, Codified Statutes, 1871-2, pp. 423-4.

I apprehend that this statute needs no further interpretation than to apply to it the ordinary rules of English grammar to arrive at the conclusion I have stated; and that as to the claim asserted against the county in this action there is no authority in law for its allowance, nor has there ever been.

It is conceded that at the time this act of February, 1873, passed there was an act authorizing the clerks of the district courts to receive fees in civil, and in some instances in criminal, cases, corresponding to the amounts claimed in the bill by the respondent in this case. But the act granting fees to the clerk of the district courts, of February, 1879, repealed this.

I contend that when that act was repealed the whole subject with all of its contingencies fell to the ground. The effect of a repealing statute is to obliterate the statute repealed as completely from the record as though it had never been passed. If the statute repealed authorizes a recovery of a penalty, the repeal puts an end to all actions for penalties under it pending when the repeal takes effect. *Yeaton v. U. S.* 5 Cranch, 281.

The same rule applies to all cases, both criminal and civil, pending when the repeal takes effect. It defeats even the jurisdiction of a court in a case pending. See Sedgwick on Statutory Law, 129-134.

In this case the statute authorizing the district clerk to receive fees such as mentioned in the judge's bill had long been repealed before the services were claimed to have been rendered, save the items of \$3 for trying each



case, paid and allowed. Hence we see that no such fees are allowed the probate judge, and that the fee bill under which he claims was repealed years before the demand accrued.

I contend, further, that there is no law authorizing or permitting the county commissioners paying the probate judge anything in case the proceeds of his office amount to \$500 per year. R. S. pp. 487, 488, sec. 383. It is not contended that his emoluments did not reach that sum; if not, then his claim should be accompanied by proof to that effect.

Regardless of the foregoing, the statute constitutes the county commissioners absolute judges and arbiters as to whether they will allow even the \$3 fee, or any other fee. They are the judges as to whether petty criminal prosecutions shall be paid for by the county or not. They have an absolute discretion, and it will devolve upon any appellant to show an abuse thereof before their action can be overruled by courts. R. S. p. 538, sec. 610.

Sec. 409, pp. 340, 341, Revised Statutes, provides one class of cases for which the county shall pay the costs; but even were the probate judge's costs taxable under this section, the record does not disclose any compliance with its requirements. When the law requires an execution to issue, it is no compliance to certify that it would be useless, as in this case. The judge and district attorney must both certify to the correctness of the cost bill before the commissioners are authorized to allow it. This must apply as well to the probate as the witnesses' or sheriff's costs.

Section 410 provides for cases less than a felony; in cases where the defendant is discharged. Here the commissioners are strictly forbidden to pay any costs, except such as are expressly compensated by law. Of this class the bill is mostly made up, probably, but the record nor bill does not disclose the fact, not a single item or case. It is impossible to determine under what section the bill is intended to come.

Section 411 provides for payment of costs in cases of felony — shall be taxed as thereafter provided, *i. e.*, sec. 419, by the district clerk. These do not come under that head.

It is the evident intention that costs in criminal cases shall be strictly scrutinized by the commissioners. It is the duty of all officers or others claiming costs to accompany their bills with such explicit dates as will enable the commissioners to determine the nature of the action and all of the proceedings had; whether the action was prosecuted for the good of society, by the proper officers, or merely to accumulate costs.

In these seventeen cases nothing of the kind appears. Look, for instance, at the first case on the bill. "Filing complaint and docketing case, \$2.50." Warrant, \$1; subpoena, \$1.50; filing same, 80 cents; swearing three witnesses, 75 cents; entering two orders, etc.

I contend that any county that will be obliged to pay bills thus made out and authenticated must necessarily be bankrupt by the practice. Such is not the intention of the legislature. If probate judges' bills must be paid in that way other officers' must also; they all come under the same provisions. I contend that, providing these absurd items charged in this bill were payable in fact from the county treasury, there is a fatal defect in the mode of presenting and proving the account, and the commissioners under their oaths could not allow it, even if they believed such items might be payable if properly presented and certified or proven.

Sec. 357, p. 482, Revised Statutes, expressly provides, "No account shall be allowed by the county commissioners unless the same be made out in separate items and the nature of each item stated, nor unless the same be verified by affidavit, showing that the said account is just and wholly unpaid.

How, under this statute, could the commissioners allow this bill, even although the items were chargeable to the county?

CORNELIUS HEDGES, *pro se*.

The respondent accepts the introductory statement of appellants as substantially correct, except that it inferentially states that the judgment of the court below was rendered in favor of respondent without argument or consideration, as a mere formal matter, whereas, in truth, every point here and now presented was then presented, fully argued and duly considered by the court.

1. Appellant claims that at the time the account and claim accrued on which this action is based, there was no law authorizing the probate judge or clerk to charge or receive any compensation in any criminal case from defendant or county, except \$3 for trying each case.

The first organic act of the territory gave to probate courts no civil or criminal jurisdiction, save in purely probate matters, but the territorial legislature made all probate judges justices of the peace, styling them "probate justices." And the universal practice since the organization of the territory in every county till the act of May 3, 1873, has been to allow probate courts the same fees in criminal matters as were paid to justices of the peace. The amendment of March 2, 1867, to the organic act expressly confers upon the probate courts criminal jurisdiction in cases not requiring the intervention of a grand jury. From that time the term "probate justice" disappears. The fees allowed to justices of the peace continued to be allowed to probate courts for criminal business transacted, until the act of May 3, 1873, referred to by appellants, changed the standard, and thenceforward allowed the same fees as paid to the district court clerks in similar cases.

The claim of respondent rests securely upon the "grammatical English meaning" of the language used in the said act of May 3, 1873, and which remained unchanged and unrepealed at the time respondent's claim originated.

The words, "for all civil cases," cover fully one department of business transacted in the probate courts,



while "probate matters" covers another just as distinct class; while the words "and other than" allude as distinctly and directly to still other matters than "civil cases" and "probate matters," as language can be made to express it. The interpretation asked for by appellant would expunge the word "and" altogether from the sentence referred to, and treat it as if it read thus: "for all civil cases other than probate matters," an interpretation clearly never intended.

The subsequent clause, "for trying each case, three dollars," was made necessary by the fact that clerks of the district court did not try cases, and hence their fee bill furnished no standard; and still further was this needed because by the Bannack statute the fee of a justice was \$4 for trying a criminal case, and only \$3 for a civil case.

If the construction of this provision of statute were even doubtful, the interpretation asked for by the appellants would involve the gross injustice of the legislature devolving new and heavy duties upon certain officers, receiving only fees and no salary, making it a misdemeanor (see sec. 513, p. 353, Revised Statutes) to refuse to discharge the duties for which they could receive no compensation.

Until the act of May, 1873, the fee bill of justices of the peace in criminal matters was indirectly and impliedly the standard for charges by probate courts. Since that act, at least during the time that respondent's bill was made, the fee bill of the clerk of the district court was expressly the standard for charges by probate courts, in all matters "other than probate matters," whether civil or otherwise.

2. Appellants concede that the fees charged by respondent were those allowed clerks of district court when the act of 1873 was passed, but claim that the subsequent enactment of a new method of compensation for said clerks, and the repeal of the old fee bill, changed the interpretation that had been given to the law of 1873 for

six years after its adoption. To state the objection exposes its weakness.

Instead of providing a special fee bill for probate courts transacting other than probate business, reference is made to a particular fee bill then existing. It is the same as if all the items had been specified on the familiar principle: "*Certum est, quod certum reddi potest.*" It may not be the most approved method of enacting laws, but the national and state statutes are full of examples of the same kind. The meaning once attached remained unchanged till the act of May 3, 1873, was itself repealed. No canons of interpretation recognized "*in foro juris, seu rationis,*" could possibly be found to lend even color to the theory propounded by the appellants.

3. Again, it is claimed by appellants that there was no law authorizing the commissioners to pay the probate judge for any business done, provided the proceeds of his office amount to \$500 per annum.

Reference to the section of Revised Statutes mentioned by appellants, and following the subject matter back through all the codes to its first enactment by the Bannack legislature, shows that the restrictive proviso applies always and only and expressly to *probate* business, about the nature of which there can be no controversy.

4. Appellants claim that by sec. 610, p. 538, Revised Statutes, it is a matter discretionary with the commissioners whether or not to allow costs to any extent in any criminal case.

If such grant of discretionary power has any significance whatever in view of the prior, more explicit and mandatory provision contained in sec. 410, p. 341, Revised Statutes, it cannot certainly be claimed that such discretionary power may be exercised arbitrarily, without any guide, information, investigation or restraint. Can probate courts, more than any other, be held responsible for deciding that a case has no merit before hearing the evidence? And after having heard and determined, the

certificate of the court that tried the case ought to determine whether there was reasonable cause for instituting the action, rather than the uninformed and arbitrary discretion of the county commissioners. The district attorney began every case mentioned in respondent's bill, and if any officer should be held responsible in damages for instituting frivolous suits, it should certainly be the officer who knows part of such case before it is brought into court, rather than the judge, who only gains his information from the trial. But the district attorney has been paid for his services in these identical cases, and it really looks as if the commissioners, by allowing and paying \$3 for one item of cost in each of these cases, had estopped themselves from disallowing any part of the costs on the ground that the cases were frivolous.

The scrutiny that the law contemplates and enjoins is exercised in seeing that items are not allowed for which the law makes no allowance, nor at rates greater than fixed by law.

The statute would not, surely, allow an appeal, as it now does, if it was intended that the discretion of the commissioners might be exercised arbitrarily and unchecked.

The cases charged in respondent's bill are of the class mentioned in sec. 410, p. 341, Revised Statutes, to which only the certificate of the court is required, as the probate court only has jurisdiction in such cases.

6. It is claimed that "the date of items must be so explicit as to enable the commissioners to determine the nature of the action." We fail to comprehend the meaning of this criticism, or how a *date* can make anything but the matter of time explicit. Nor do we think that every item needs a separate certificate that it was done for the good of society. The bill shows sufficiently for itself whether it is properly itemized and certified.

WADE, C. J. The respondent, claiming certain fees as probate judge of Lewis and Clarke county, presented



his account therefor to the board of commissioners of the county, and the same was disallowed, and the respondent appealed to the district court, where he recovered judgment for the amount of his claim, from which the board of commissioners appeal to this court.

It is admitted that the probate court had jurisdiction to try the cases in which these fees were charged, and that the items thereof are correct, providing the act of the legislative assembly of January 12, 1872, in relation to fees of clerks of the district court, is in force and applicable to the fees of a probate judge.

The act referred to (see Codified Statutes, p. 420) prescribed the fees that clerks of the district court should be entitled to charge for and receive.

The act of May 3, 1873 (Rev. Stat. p. 531), provides for the fees of probate judges in matters pertaining to their probate jurisdiction, to which is added the following provision: "For all civil cases, *and other than probate matters*, the same fees as are allowed to clerks of district court in similar cases."

By an act of February 21, 1879, the legislature provided that the clerks of the district court should receive a salary for their services, and repealed all acts and parts of acts relating to the fees of clerks of district courts. This act did not repeal that of May 3, 1873, wherein it is provided that probate judges, for all civil cases and other than probate matters, shall be entitled to receive the same fees as clerks of district courts in similar cases. Its purpose was to provide a salary for the clerks, and, as to them, to repeal the fee bill contained in the act of January 12, 1872. The act of May 3, 1873, remaining in force as to the fees of probate judges, and necessarily referring to the act of January 12, 1872, and, as it might be said, forming part thereof, it follows that, as to the fees of probate judges, the act of January 12, 1872, is still in force. It cannot be repealed as to probate judges while the act of May 3, 1873, is in force. Its repeal as to clerks

of district courts, while that act remains in force, does not repeal it as to probate judges.

The fees charged for in the account of the probate judge herein arose in criminal cases, and it is contended by appellants that the act of May 3, 1873, does not cover, or is not applicable to, fees in criminal cases. The act provides first for the fees in probate matters, then for fees in civil cases, and then for fees in all other cases, which must necessarily include the fees in criminal cases as specified and provided for in the act of January 12, 1872. Any different construction would require us to say that probate judges should receive no fees in any other than probate matters and civil cases, which would be a plain misinterpretation of the legislative intent.

In construing a statute effect must be given to all its language, if possible, and so, giving effect to the language used in the act of May 3, 1873, we hold that it authorized probate judges to charge for and receive such fees in criminal cases as the act of January 12, 1872, provided for and authorized the clerks of district courts to receive for similar services.

It is further contended that, by virtue of an act entitled "An act to curtail certain expenses," approved February 13, 1874, the board of county commissioners is given the arbitrary power and discretion to allow or disallow the fees of probate judges in the cases therein named, which includes the class of fees the respondent seeks to recover in this action.

That act provides as follows: "That the county commissioners of the several counties of this territory, when any bill of costs of any justice of the peace, constable, marshal, sheriff or other officer of this territory, or of any county, township or precinct therein, is presented to them for fees, in any case of misdemeanor not prosecuted by indictment, for allowance, shall not allow the same unless, in their judgment, it appeared at the time

such cause was prosecuted and said fees accrued to said officers that the public welfare and good order and peace of the territory would be promoted by such prosecution; nor shall they, in any event of conviction, allow any fee or cost of any officer out of the public funds, until they are satisfied that every reasonable effort has been exhausted to collect out of the property of the defendant or defendants convicted such fees."

This statute must be construed in connection with section 410 of the Criminal Practice Act, which provides: "If any person charged with any offense less than a felony shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath or information the same shall have been instituted, unless the officer shall certify that there was probable cause for the prosecution, in which event they shall be paid by the county in which the offense was committed."

The certificate of probable cause mentioned in this section is a judicial act, and cannot be reviewed, except by judicial authority. The county commissioners have no judicial powers. They cannot, in any sense, exercise the functions of a court. By the organic act, the judicial powers of the territory are vested in the supreme court, the district courts, the probate courts, and courts of justices of the peace, and any statute of the territory that attempts to clothe county commissioners with judicial authority is necessarily null and void. They cannot be given authority or discretionary power to say when the criminal laws of the territory shall take effect or be enforced. They have no authority to declare that a statute giving an officer certain designated fees for services performed by him is a nullity. When any person charged with a misdemeanor is discharged by the officer taking the examination, and such discharge is accompanied with a certificate of probable cause, the county in which the examination is held thereby becomes liable for the



fees provided by law consequent upon such examinations, and it is the duty of the board of county commissioners to audit and pay the same.

The judgment is affirmed, with costs.

*Judgment affirmed.*

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DAVIS, respondent, v. COMMISSIONERS OF LEWIS AND CLARKE COUNTY, appellants.

EXERCISE OF DISCRETIONARY POWERS.—In all cases where commissioners are rightfully clothed with discretionary powers in allowance of claims against the county, such discretion must be controlled by legal considerations and cannot be exercised arbitrarily. And whenever such power is exercised it is always subject to review by the courts, for which an appeal is provided by law in all cases.

*Appeal from Third District, Lewis and Clarke County.*

T. J. LOWREY, Attorney General, for appellants, who filed no separate brief in this case, but relied wholly upon considerations presented in the previous case of *Hedges v. Commissioners of Lewis and Clarke County*.

E. W. & J. K. TOOLE, for respondent.

The questions involved on this appeal are not difficult; they depend for their solution upon a proper construction of the statute.

The statutes applicable to the questions on the appeal have been considered and cited in the brief in the case of *Cornelius Hedges v. The Board of County Commissioners*, submitted at this term, and to which reference is directed for a satisfactory disposition of the points raised by appellant. It is, however, in addition contended by the attorney general, that since the enactment of the repealing clause of the statute, on the 25th of January, 1881, there can be no pretext for the claim of respondent. But this does not change the case in any respect. Sec.

588, p. 531, Revised Statutes, was inserted in the revision of 1879, and remains in full force and effect. The fact that the clerk's fee bill, to which this section refers, had theretofore been repealed, could not affect the construction of this statute. When the statute provided that the probate judge should receive, in addition, such fees in all other cases, whether civil or criminal, as are allowed to clerks of district courts, the effect was the same as if the legislature had inserted into that section the several items then allowed by law to the clerks. The question then was whether the fees charged were such as were under that law authorized by the district clerk's fee bill as it was before the repeal. Upon this no question is here made.

2. So far as this case is concerned the judgment should be affirmed, independent of the construction given to the statute upon the record.

Sec. 610, p. 538, Revised Statutes, invests the board with certain discretionary powers in allowing or rejecting accounts. The discretion here mentioned is not an arbitrary, vague and fanciful discretion,—is governed by rule, not humor; it must be legal and regular. 1 Abbott's Legal Dict. 385.

By this is meant when their judgment pronounces them frivolous after an examination of all the facts and upon notice to the parties interested. *People v. Supervisors, etc.* 10 Cal. 344.

In this connection the point we make is that the judgment of the board is not final or conclusive. This is evident from the fact that provision is made by statute for appeals in all cases from the disallowance of any account by the board. Sec. 359, p. 483, R. S.

If the question of the propriety or impropriety of the allowance or disallowance of these accounts was not the subject of review in the district court, the provision for appeal would be a delusion and a nullity.

It follows, then, that the discretion invested in the

board is not conclusive of the case there made, but that the whole question upon the appeal may be investigated in the district court. This being so, how stands the case on the record?

No statement being appended, everything is in favor of the judgment of the district court, and that everything was found by the judge below to support the judgment.

The decisions of this court are uniform that a judgment will not be disturbed as against law when there is no statement of the case. *Davis v. Germain*, 1 Mont. 210; *Ming v. Truett*, id. 322.

WADE, C. J. This is an appeal from a judgment of the district court reversing the action of the board of county commissioners of Lewis and Clarke county in disallowing certain fees claimed by respondent from the county as probate judge thereof. The case is in all respects similar to that of *Hedges v. The Board of Commissioners*, decided at this term, to which reference is made (see *ante*, p. 280).

All that we wish to say in addition is, that in all cases where the commissioners are rightfully clothed with discretionary power or authority in the allowance of claims against the county, such discretion is not arbitrary, but it must be controlled by legal considerations, and when exercised is always subject to review by the courts.

The statute preserves the right of appeal from the board of commissioners to the district court in any and all cases where accounts against the county are disallowed. R. S. sec. 359, p. 483.

The judgment is affirmed, with costs.

*Judgment affirmed.*



**TERRITORY OF MONTANA, respondent, *v.* DOOLEY, appellant.**

**CRIMINAL LAW — *Assault with intent to commit murder, and assault and battery.***— Under an indictment charging the statutory offense of assault with intent to commit murder, a defendant cannot be convicted of a simple assault and battery. If the indictment were properly drawn, under the statute, it would support a conviction for a simple assault. Battery is not an essential part of the assault with intent to commit murder. If a charge of assault and battery is contained in the indictment therewith, two separate offenses would be charged.

An indictment, bad for the main offense charged, will not be good to support a charge or conviction for a lesser offense that might be necessarily included.

*Appeal from Second District, Deer Lodge County.*

THOS. L. NAPTON, for appellant.

The defendant was tried for an assault with the *intent* to commit murder, and found guilty by the jury of *assault and battery*. The defendant appeals from the judgment, and relies upon the judgment roll.

1. The indictment does not state facts sufficient to justify the entry of judgment on the verdict of the jury, in that it does not charge who the particular person was whom the defendant assaulted with intent to commit murder, or any other offense. It does state that he assaulted and battered Julius Erich, but does not charge any intent on his (defendant's) part to do so; and this charge of the assault and battery is only by way of a description of *how* the offense was committed, and is nothing but a recital in the indictment. If the indictment should charge the defendant, in its charging clauses, with *assault and battery* with intent to murder, this judgment might be valid, if the territory had specified who he intended to murder, or who, by way of recital, he intended to murder. This is absolutely necessary in order to enter any judgment in the case. This indictment is in part from Archbold's Practice and Pleading in Criminal Cases, but

the very essential thing to allege is left out. See Wharton's Precedents, vol. 1, 242; 2 Bishop's Crim. Law, sec. 644; Archbold's Pr. and Pl. vol. 2, p. 71; *State v. Patrick*, 3 Wis. 812; 28 Am. Rep. 3; 31 Am. Rep. 257; 36 Am. Rep. 8; *Lacefield v. State*, 34 Ark. 275; *State v. Miller*, 25 Kans. 699; *State v. Chendy*, 67 Mo. 41; Bishop on Statutory Crimes, secs. 502, 503, 505, 506.

Assault with intent to murder does not include a battery. It is not a necessary or component or constituent part thereof, and not being charged with it, defendant cannot be found guilty thereof. See *People v. Keefer*, 18 Cal. 636; *People v. Lightner*, 49 Cal. 228; *People v. English*, 30 Cal. 214.

The jury being discharged without a proper verdict, the judgment should have been for defendant.

THOS. J. LOWREY, Attorney General, for respondent.

The only question presented is: "Does the indictment state facts sufficient to support the verdict?"

It is immaterial for the purposes of this argument whether the indictment was intended to charge the crime of an assault and battery with intent to commit murder, which would include the statutory offense of assault with such intent.

It is conceded that the indictment, as claimed by the learned counsel for the appellant, fails to state facts sufficient to constitute the statutory crime of assault with intent to murder, because it does not state who the defendant intended to murder.

As a matter of fact, the indictment sets forth every element of the offense of assault and battery, and perhaps nothing more. If it also is sufficient to sustain a verdict for assault with intent to kill, the appellant certainly cannot complain that the jury convicted on the smallest charge. The substance of the indictment is: "That Patrick Dooley, on October 28, 1881, at Deer Lodge, etc., did wilfully, unlawfully and feloniously make an assault

upon Julius Erich with a pistol, which he then and there had and held, charged with gunpowder and a leaden bullet, which pistol the said Patrick Dooley then and there shot off against the said Julius, etc., in this manner, and by means aforesaid did unlawfully wilfully and feloniously strike, penetrate and wound said Julius," etc.

That this constitutes a full and complete accusation of the crime of assault and battery cannot be seriously denied. The additional sentence, "with intent then and there unlawfully, wilfully and feloniously to kill and murder," not stating whom, may well be disregarded as surplusage, as it evidently was in the court below.

With this view of the case, it is immaterial as to whether the offense of assault and battery is necessarily included in the offense of assault with intent to murder or not.

This indictment charges a battery, which would not be a necessary ingredient in a charge of "assault with intent," but would properly be in such an indictment, but is necessary to support this verdict. Under this condition of the case the authorities cited by the appellant undoubtedly support the integrity of the judgment appealed from.

Under this indictment the jury might well have found defendant guilty of an assault with a deadly weapon, or assault and battery, or simple assault, but probably a verdict of guilty of assault with intent to murder would be bad on motion for arrest of judgment.

WADE, C. J. This appeal presents one question only, viz.: Can a defendant, under an indictment charging him with an assault with intent to commit murder, be lawfully convicted of an assault and battery?

Our statute provides that "an assault with intent to commit murder shall subject the offender" to the punishment therein provided. Under this statute a battery is not necessary to an assault with intent to commit



murder. It does not necessarily form one of the elements of that crime. It is not one of the essential parts thereof, and is not necessarily included therein. An assault with intent to commit murder may be perfect and complete without a battery. If, therefore, an indictment charging a defendant with an assault with intent to commit murder also charges an assault and battery, it is subject to the objection that it charges two offenses in one indictment, which our statute forbids.

The statute does not authorize the charge of an *assault and battery* with intent to commit murder, but an assault with such intent, and, though the indictment may recite a battery in connection with and as the consummation of the assault, such recital forms no part of the charge. It follows, therefore, that under such an indictment the only crimes for which a defendant might be convicted would be an assault with intent to commit murder, and a simple assault.

The defendant was tried as for an assault with intent to murder. The indictment did not support the charge, and the objection to it ought to have been sustained.

The indictment being bad as an indictment for an assault with intent to murder, it cannot support a charge of a lesser crime, which, if the indictment were good, would necessarily be included in it. The lesser falls with the greater. The elements that make up an indictment for an assault with intent to murder have no vitality as independent charges, after the main charge upon which they depend fails. The defendant must know with absolute certainty for what he is being tried.

The judgment is reversed, and the cause remanded for a new trial.

*Judgment reversed.*

HAUSWIRTH ET AL., respondents, v. BUTCHER ET AL.,  
appellants.

QUARTZ LODGE LOCATION — *Grant — Right of possession — Substantial compliance — Void for indefiniteness — Boundaries and record to correspond.*— A location on the public mineral lands of the United States, made in strict accordance with the law of congress, carries with it a grant and a right to exclusive possession.

To make this grant effectual, the location must be distinctly marked on the ground, and the record of the location must contain such a description as will identify the claim by reference to some natural object or permanent monument. Neither grant or right of possession attach to a location that does not give the notice required.

There must be substantial compliance with law as to the length of a claim. A claim of a mining location two thousand feet in length will not protect claimants against intervening claims of third persons for the five hundred feet more than the law allows.

*Quære*, whether such a claim would be good for fifteen hundred feet or entirely void for uncertainty.

It is essential that the proper length be marked on the ground as stated in the record, and the two should correspond.

Pleadings ought to support the judgment and must be consistent.

There are cases in which common error makes right what otherwise would be irregular.

*Appeal from Second District, Silver Bow County.*

KNOWLES & FORBIS, for appellants.

The evidence in this cause was insufficient to justify and sustain the verdict. The plaintiffs' evidence shows that the locating and marking of boundaries on the ground of the Triumph lode claim, under which plaintiffs claim, was by stakes set two thousand feet apart (Transcript, p. 57), while the ground claimed by plaintiffs, according to the record of the claim, was only one thousand five hundred feet. The location must be distinctly marked on the ground so that its boundaries can be readily traced. R. S. U. S. sec. 2324.

The intention of the statute was to require such a marking on the ground of the boundaries of a claim as would give notice of the location to one who, in good

faith, is looking for unoccupied ground, and enable an honest inquirer to ascertain exactly the ground appropriated. *Gleason v. Martin White M. Co.* 13 Nev. 462; *Mount Diablo M. & M. Co. v. Callison*, 5 Saw. 449.

The stakes, as set, imported no notice to the prospector of the extent of the ground located, and plaintiffs, if this is a valid location, could swing or float their location east or west five hundred feet to include any valuable discovery made on either the east or west end. This would be virtually a location of two thousand feet in length, with a privilege in the locators, when an adverse claim is made, to select any one thousand five hundred feet in length included thereon.

If such a location can be sustained, all locations would be made two thousand feet in length, and other locators could not venture to prospect on any portion of the location, for a rich discovery would only determine the first locator to make his selection and include the valuable portion, and exclude or drop off the worthless portion. This may be done by cutting off the excess from one end or both ends, and claiming the center; and if this can be done, there is no good reason why both ends may not be held and the excess taken from the center of the claim.

It is not insisted that a few feet in excess would invalidate a claim, but the excess in this case, five hundred feet, is inexcusable, and certainly sufficient to invalidate the claim for uncertainty. If there is sufficient certainty of location in this case, what excess would be required to invalidate a claim?

The court erred in permitting plaintiffs to introduce evidence of a compromise line between plaintiffs' and defendants' claims. Verbal confessions or admissions as to title of real property are not admissible. *Jackson v. Shearman*, 6 Johns. 19; *Jackson v. Vosburg*, 7 Johns. 186, and cases cited.

The evidence was not admissible under the pleading. The estoppel is not sufficiently pleaded, and the evidence



should have been excluded for that reason. Plaintiffs in their complaint allege possession in defendant, which is admitted in defendants' answer. Plaintiffs then, in order to plead an estoppel, contradict the former pleadings and admissions contained therein, and allege possession to be in plaintiffs, and the evidence was introduced under this pleading, which it was certainly error to admit, as it directly contradicted the admissions in the pleading.

Plaintiffs' first and second instructions are as follows:

"1. The jury are instructed that, before they should find for the defendants, they should find from the evidence that the original location stakes of the Bachelor lode cover and include the ground in dispute." Record, p. 38.

"2. If the jury find from the evidence that the original location of the Bachelor lode, as located and staked by Ferdinand Hirsch, did not at the time of such location include and cover the ground in dispute, then they should find for the plaintiffs."

This is an action of ejectment, and both parties claim by virtue of a location of ground under the laws of congress. The rule of law is not correctly stated in the instructions. According to the instructions it devolves on defendants to make out title in order to recover. The true rule of law requires plaintiffs to show title in themselves in order to recover. *Owen v. Fowler*, 24 Cal. 192; *Owen v. Morton*, 24 Cal. 373; *Irwin v. Towne*, 42 Cal. 326; *Talbert v. Hopper*, id. 397; *Ferm v. Helme*, 21 How. 481.

If neither party had title, defendants were entitled to recover by virtue of their possession. But the court took the whole matter from the jury, and instructed them that defendants must show title. Even admitting that defendants had no title, they might still recover upon their possession, and it was error for the court to instruct otherwise. By these instructions the court virtually instructed the jury that plaintiffs' location was not only sufficient, but that it included the ground in dispute.

These were questions of fact for the jury and the court could not decide them. *Page v. Hobbs*, 27 Cal. 484; *Megerle v. Ashe*, 33 Cal. 74; *Van Ness v. Packard*, 2 Pet. 149; *C. & O. Canal Co. v. Knapp*, 9 Pet. 568.

Plaintiffs cannot claim that their location had been so conclusively proven as to justify these instructions. If their location was not absolutely void, there certainly was sufficient question as to its sufficiency to be submitted to a jury, and the court cannot deprive defendants of the right to submit such question to a jury and have a finding thereon.

The correct principle of law is stated in defendants first and seventh instructions (Record, p. 42):

"1. This is an action to determine title to the tract of ground in controversy, and in order for plaintiffs to recover they must show title or right to possession of such ground, and unless they do show title or right to possession they are not entitled to recover in this action, and you will find for defendants."

"7. Defendants' possession, which is admitted in the pleading, is sufficient for them to recover unless plaintiffs show a better or superior right or title."

If these instructions correctly state the law, then plaintiffs' instructions were certainly erroneous, for they are directly in conflict. Nor will the correctness of defendants' instructions cure the error in plaintiffs'; for if there is conflict it is impossible to determine upon which the jury acted, and the courts in such cases universally grant new trials. *Chidester v. Con. P. Ditch Co.* 53 Cal. 56; *Brown v. McAllister*, 39 Cal. 573; *Clark v. McEloy*, 11 Cal. 161; *McCreery v. Everding*, 44 Cal. 246; *People v. Anderson*, id. 65; *Graham & Waterman on New Trials*, vol. 3, 800; *Sayre v. Townsend*, 13 Wend. 647.

The other instructions of plaintiffs, Nos. 4 and 5, are open to the same objections, and state that, if defendants do not succeed in making out title, the jury should find for plaintiffs. The sufficiency of plaintiffs' location is pre-

sumed throughout plaintiffs' entire instructions; and the whole case is founded upon the theory that the burden of proving title devolved on defendants.

ROBINSON & STAPLETON, for respondents.

This is an appeal from an order overruling a motion for a new trial. The pleadings show these facts: That on the 1st day of August, 1880, plaintiffs were in possession of and owners of the Triumph lode, and which included the ground in controversy (see Complaint, Record, p. 2 *et seq.*), and that on the 25th of August, 1880, the defendants entered on a portion of the said Triumph lode, describing the portion so entered upon by the defendants. See Record, p. 3.

The answer of defendants denies plaintiffs' title to only the  $1\frac{48}{100}$  in dispute (see Answer, Record, pp. 8, 9), and denies that said part in dispute was a part of the said Triumph lode or included within it (p. 9); and affirmatively avers that in October, 1875, the predecessors in interest of defendants located a claim under the name of the Bachelor lode, and that the ground in dispute, one and forty-eight one-hundredths acres, is a part of the said Bachelor lode claim. See Answer, Record, pp. 10, 11.

Thus, by the pleadings, the location of the Triumph lode is admitted, its location being alleged and not controverted, and no proof was required by plaintiffs to establish its location, which is an answer to appellants' first objection (Record, p. 72), that the evidence is not sufficient to establish such location.

Then on the proof adduced, which was unnecessary, it is shown that the Triumph lode was located by plaintiffs Robt. McMinn, John and Emanuel Hauswirth in May, 1877. Record, pp. 18, 19, 55, 27.

There was evidence that the ground in controversy was not included within the Bachelor location. There was a conflict in the evidence as to this. See evidence of Hirsch and of McMinn. Also testimony of Peter Shurr. Also



testimony of Bunsman, p. 62, line 7 to line 22. Deeds from Hauswirth to T. C. Anderson and Hottendorff, plaintiffs. The location of Triumph lode was made by plaintiffs McMin, John Hauswirth and E. Hauswirth, and interests assigned to Anderson and Hottendorff.

The case was tried on the theory of defendants being in possession, and the jury were instructed to disregard any evidence of plaintiffs being in possession. See the pleadings above referred to, and the defendants' second and seventh instructions.

The evidence cannot contradict the pleadings, and no harm was done to defendants by reason of such showing by the evidence, and the motion for non-suit was properly overruled.

As to appellants' second specification of error of law, and as embodied in their second exception, which see, respondents claim that no error was committed in admitting evidence of such compromise. The rule of law is well settled, that adjacent owners of land may verbally agree on the division line between them, which is in dispute, and when such is agreed upon and the boundaries marked, it is not within the statute of frauds; it is not a contract for the sale of land, and such contracts have ever been sustained. *Lindsay v. Springer*, 4 How. (Del.) 547; *Blair v. Smith*, 16 Mo. 273; *Grey v. Berry*, 9 N. H. 473; *Orr v. Hadly*, 36 N. H. 575; U. S. Dig. vol. 3 (old series), p. 153, sec. 171; *Rabner v. Anderson*, 63 N. C. 365; *McCoy v. Hutchinez*, 8 W. & S. (Pa.) 66; *Houston v. Sneed*, 15 Tex. 307; Waterman on Trespass, vol. 2, pp. 110, 111, and cases cited; Wait's Act. & Def. vol. 6, p. 690; *Clark v. Hulsey*, 54 Ga. 608; *Rutherford v. Tracy*, 48 Mo. 325; 8 Am. Rep. 104; *Stanwood v. McClellan*, 48 Mo. 275; *Hoxey v. Clay*, 20 Tex. 582.

In the case at bar, the title in plaintiff to the Triumph lode, and title to the Bachelor lode in defendants, is not in dispute. The only thing in dispute is a fraction of one and forty-eight one-hundredths acres lying between the

main location of said two lodes; and it is only a question of boundaries between the Triumph and Bachelor lodes or locations as to whether this one and forty-eight one-hundredths acres was included in the Bachelor location; and the record shows this was the only real question involved. Such being the case, it was proper for the parties to agree verbally as to the dividing line, and to mark the same and go into possession accordingly. Such would not be within the statute of frauds, and the parties would be estopped from controverting it.

The fourth and last error of law complained of is as to giving instructions — that they are against law, etc. It would be uselessly consuming time to cite authorities to the effect that, in determining the correctness of any instruction, all the instructions given must be considered and taken together; and if, as a whole, the law of the case is properly given, the judgment will stand. This, we claim, has been done, and the jury was not misled.

Conceding, as an abstract proposition, that plaintiffs' first and second instructions were wrong, standing by themselves, we claim that, taking them in connection with defendants' first and seventh instructions, the jury were not misled. *Livermore v. Stine*, 43 Cal. 274; *Solen v. R. R. Co.* 13 Nev. 139; *Railway Co. v. Whitton*, 13 Wall. 290.

Instructions must always be given with reference to the pleadings and evidence. In this case the only issue really was as to whether or not the ground in dispute is within the Bachelor location. The case was tried on this theory: Plaintiffs' Triumph being admitted in the pleadings and established by evidence, defendants denying title in plaintiffs to only the part in dispute, and claiming title thereto by virtue of an older location, it became a question as to whether or not it was included within the Bachelor location.

The exceptions to the instruction cannot be considered, for the reason they are too general and not specific, and

do not specify that they conflict. *Griswold v. Boley*, 1 Mont. 549; *McKinney v. Powers*, 2 Mont. 446; *Hicks v. Coleman*, 25 Cal. 146.

The Practice Act, under which the two above cited Montana decisions were rendered, is same as now. Sec. 202, act of 1871-2, subd. 7, and sec. 229, same act, Codified Statutes, 71 and 72. See Statutes of 1877; R. S. of 1879, p. 86, sec. 253, subd. 7, and sec. 281, p. 91. Section 203, Codified Statutes of 1871-2, is favorable to our construction.

WADE, C. J. This appeal, among other things, calls in question the validity of a mining claim location under the act of congress of May 10, 1872. The respondents claim title and right of possession to the ground in dispute by virtue of their location of the Triumph lode mining claim, which location, the appellants contend, is void, for the reason that the testimony disclosed the fact that the Triumph location is two thousand feet in length on the southern boundary line, and therefore not authorized by the act aforesaid.

The act of congress provides: "A mining claim, located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode." . . . "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." Such a location on the public mineral lands of the United States carries with it a grant from the government to the person making the same, and confers upon such a person the right to the exclusive possession and enjoyment of all the surface ground within the lines of such location. In order to



make this grant effectual, the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and the record of the location must contain such a description of the claim as will identify it by reference to some natural object or permanent monument. Such reference is as necessary as that the record should contain the date of the location and the name of the person making the same. Both requirements are for the purpose of notice. Neither a grant or the right of possession attach to a location that does not give the notice required. As was said in the case of *Belk v. Meagher et al.* 3 Mont. 80, there is no grant from the government under the act of congress, unless there is a location according to law. Such a location is a condition precedent to the grant. And in the same case, in the supreme court of the United States, it is held: "That the right of location upon the mineral lands of the United States is a privilege granted by congress, but can only be exercised within the limits prescribed by the grant. The right to possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

Before there can be a valid location there must be a discovery. Taking the discovery as the initial point, the boundaries must be so definite and certain as that they can be readily traced, and they must be within the limits authorized by law. Otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice, and would be equivalent to no boundaries at all. A discovery entitles the person making the same to a mining claim, embracing the discovery, not to exceed one thousand five hundred feet in length by six hundred in width. Within these limits, if

the boundaries are properly marked on the ground, and the location properly made and recorded, the grant of the government attaches, and third persons must take notice. But they would not be required to look for stakes or boundaries outside of, or beyond, the utmost limits of location as authorized by the statute.

As to the length of a mining claim, there must be a substantial compliance with the law, as there must in all other respects pertaining to the location. The claim in question, as shown by the stakes and boundaries thereof, is two thousand feet in length, whereas the greatest length, as authorized by law, is fifteen hundred feet. If such a location could be sustained to the extent of fifteen hundred feet, where the rights of third persons had not intervened, which we do not decide, certainly, if such rights had attached, such a location would not protect five hundred feet in length of claim more than the law authorizes by virtue of one discovery. A fifteen hundred feet claim cannot be shifted from one end to the other of a two thousand feet claim, as circumstances might require, to cover the discovery of a third person within such two thousand feet location.

“The object of the law in requiring the location to be marked upon the ground is to fix the claim, to prevent floating or swinging, so that those who, in good faith, are looking for unoccupied ground in the vicinity of previous locations, may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. The provisions of the law designed for the attainment of this object are most important and beneficent, and they ought not to be frittered away by construction.” *Gleason v. Martin White M. Co.* 13 Nev. 462.

“The locator should make his location so certain that the miners who follow him may know the extent of his claim, and be able to locate the unoccupied ground without fear that, when they have found a paying mine, the theretofore indefinite lines of some prior location may be

made to embrace it." *Mt. Diablo M. & M. Co. v. Callison*, 5 Saw. 449.

There is one other consideration. The complaint alleges entry and ouster by the defendants as to the ground in dispute, and charges that possession thereof is held by the defendants. The replication avers that the plaintiffs are, and for a long time have been, in possession of the premises. If the replication is true, the complaint is false. If the complaint is true, the replication is untrue. They flatly contradict each other. If the averments of the complaint state a cause of action, the replication, if true, entirely defeats such action. Testimony that would support the replication would destroy the complaint and the plaintiffs' cause of action. The pleadings ought to support the judgment and be consistent with each other.

The affidavit to the Triumph location states that the foregoing notice is a similar copy of the original notice of location of the claim as posted thereon the day therein stated. In view of the fact that most of the locations in Silver Bow and Deer Lodge counties are authenticated by similar affidavits, and that to decide that such is insufficient would disturb many titles, we hold the same good,— "*Communis error facit jus.*"

The judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

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J. H. RUSSELL, respondent, v. WM. CHUMASERO ET AL.,  
appellants.

QUARTZ LODGE CLAIMS — *Sufficiency of declaratory statement matter of proof — Defective record cured — Boundaries.*— What are or what are not permanent objects or monuments, as contemplated by the act of congress allowing entries of mineral claims on the public domain, is properly matter of proof for a jury, and cannot be decided by the court by simple reference to the declaratory statement.



A defective record might be cured by stakes or monuments on the ground to identify the claim.

A description giving other claims for boundaries may be good if those claims are marked on the ground as the law contemplates, and this should be open to proof.

*Hauswirth v. Butcher*, ante, p. 299, affirmed.

*Appeal from Third District, Lewis and Clarke County.*

E. W. & J. K. TOOLE, for appellants.

1. The offer of the plaintiff to prove his actual possession and occupancy of the property was an offer to establish title as against one who in no way connects himself with a better one. *Atwood v. Tricott*, 17 Cal. 37; *English v. Johnson*, id. 107; *Hess v. Winder*, 30 Cal. 355. And this principle is especially applicable when the question is one barely of right of possession under the act of congress, when the better title must prevail. Then plaintiff showed actual possession, and defendants were not required to and did not show any right of possession. *Campbell v. Rankin*, Copp's U. S. Mineral Laws, p. 354. Besides, it was competent under sec. 2332, and was sufficient to entitle him to a patent under said section.

2. The record offered in evidence was all that the law requires. The offer to identify the natural objects or permanent monuments was competent and sufficient. See *Campbell v. Rankin*, supra, 355; *Southern Cross G. & S. M. Co. v. Eureka Co.* 15 Nev. 383.

The only tenable grounds upon which the objection could stand is that the record was insufficient to secure a grant to the plaintiff, and consequently that title was still in the government, defendant not showing or attempting to show any in himself. But, by sec. 910, U. S. Statutes, applicable to this case, title in the government is not available to either party. See Copp's U. S. Mineral Laws, p. 27, sec. 910.

It is needless to cite authorities to show that actual possession of this kind of property is taken by marking out its boundaries so as that the same can be readily

traced, which plaintiff proposed to prove. Nor do we consider it necessary to cite authorities to the effect, that such possession carries with it the presumption of legal title. All that is necessary in such a case to support a valid legal title will be presumed until the contrary is shown. The supreme court of the United States, in *Campbell v. Rankin*, *supra*, says: "If this be the law when the right of recovery depends upon the strict legal title in the plaintiff, how much more appropriate is it of the superior right of possession under the act of congress which respects such possession among miners. Whatever may be the effect given to the record of a mining claim under the act of congress, approved May 10, 1872, it certainly cannot be greater than that given to the registration laws of the states; and they have never been held to exclude parol proof of actual possession, and the extent of that possession, as *prima facie* evidence of title."

CHUMASERO & CHADWICK and SANDERS & CULLEN, for respondents.

This was an action under the mining act of 1872, to determine the right to a patent of the ground in controversy between the parties, the question being which of them has the right to occupy and possess the ground, and obtain title.

The pleadings are as follows:

1. The complaint alleges that on the 1st of June, 1877, the plaintiff was the owner of what he calls the Alta lode.
2. That the defendants claim a portion of said lode as the Free Speech lode, and have applied for a patent; and that plaintiff interposed an adverse claim, and asks that defendant's claim be declared invalid.
3. The answer denies that plaintiff ever was or is the owner of, or in possession of, the premises claimed by defendants as the Free Speech lode; a portion of which is included in the adverse claim of plaintiff.

4. It denies that there is any such lode as "Alta."

5. It denies that the premises claimed by Russell were subject to location.

6. Avers the discovery, location and record of the Free Speech lode by defendants, in October, 1874.

7. That on the 26th of July, 1876, the plaintiff made a pretended location of the premises in controversy, being a portion of the Free Speech lode.

8. That the notice of location, and the location, are too uncertain and indefinite to fulfil the requirements of the law, and that the survey does not comply therewith.

9. Avers the quiet and peaceable possession of the premises in controversy by defendants since November, 1874.

10. Denies all right, title or interest of the plaintiff in or to said premises.

The object of the suit is to determine between the parties which has the better right—both of them making claim under a law of congress, and each denying the right of the other.

Those rights are dependent upon a compliance with the law.

First, on the part of plaintiff, he must show a discovery on vacant and unoccupied land—a valid location—and a record, such as the law requires. See sec. 2324, R. S. U. S.

All such records "must contain" such a description of the claim located, by reference to some natural object or permanent monument, as will identify it. The location must be distinctly marked on the ground, so that its boundaries can be readily traced.

An action like the present is not an *ex parte* proceeding, as assumed by appellant, in which occupancy and possession are all that a party is required to prove. It is one where two conflicting claims are set up, and where the best must win. Everything is in issue, and the plaintiff is required to prove more than that he took pos-



session and occupied. He must show his right so to occupy and possess the disputed ground, or he fails to make a case.

The case in 17th California, p. 37, cited by appellant, is not in point. That action was brought before the act of 1872 was passed, providing for the obtainment of title, and the only material question in that case was the extent of possession. The plaintiff proved the usual customs and regulations as to taking up claims, etc., and the court simply decided that mining claims could be held by possession, but that such possession was regulated and defined by usage, and local and conventional rules; that the claim must be defined as to limits before possession or working on a part would constitute possession of any more than the part actually possessed or worked.

In this case the law takes the place of the customs and usages of miners. It follows from the decision itself that there must be a compliance with them.

The case on page 107, cited, is in reference to a placer claim, and does not vary the tenor of the decision first quoted.

The case in 30th California, 349, is also a case of possession under local customs and usage, and all of the cases cited were prior to the act of 1872, which finally established rules under which a party claiming mining ground might hold and possess it, and rendered a compliance with the law imperative.

The case of *Campbell v. Rankin*, cited, is simply that, in an action *quare clausum fregit* for damages, possession is *prima facie* evidence of title sufficient for a recovery against a mere trespasser—a proposition we do not dispute.

But this is not an action of trespass *quare clausum*; nor is the respondent a naked trespasser. Section 2324, quoted by appellants, is still wider from the mark than the authorities above cited. That section expressly ex-

cepts all cases where there are adverse claims, and can cut no figure in this case.

The case in 15th Nevada, 383, simply holds that stakes and stone monuments, being put at each corner of the claim, and at the center of each of the end lines, were a sufficient marking, and that a record was not required by the Nevada laws.

Our law did require a record, and the mining laws of the United States distinctly specify what that record should contain.

We deny the proposition of appellant that any presumption arises in a case like this in favor of appellant. The respondent enters into possession of his claim, and applies for title under the act of 1872. The appellant seeks, through the courts, to defeat that application. If there are any presumptions, they certainly are not in favor of the adverse claimant.

A comparison of appellant's brief in this case with that in the Hoyt case, where he is the respondent, will show a striking contrast. We contend that (if the case here is presented in such way as to justify this court in looking at the questions raised by appellant) the court below did not err in excluding the record of the Alta lode. It does not contain any of the requirements of the statute. It is indefinite and uncertain, and from it the boundaries could not be readily traced, if at all. The record of a claim is required to contain such a description of the claim, by reference to some natural object or permanent monument, as will *identify* it, and so that its boundaries can be readily traced. Sec. 2324; *Gleason v. Martin White Company*, 13 Nev. 464. No courses, no distances, no description of the claim, or reference to any natural object or permanent monument, is given. It claims one thousand three hundred feet westerly and two hundred feet easterly from discovery; thence to stake "A" three hundred feet, etc. At what point does it commence? In what direction does it run? Could any one trace it from

the notice on record? From the notice and description a plat of ground of an endless variety of shapes and directions could be formed; and all that would be necessary for a claimant to obtain title would be to get a pliant surveyor to make the survey to suit his purposes.

If the Alta lode was not defined as to limit, as we contend, then the question of possession cannot arise, as there could be no possession unless of a portion actually possessed and worked. *Atwood v. Tricott*, 17 Cal. 42; *Sears v. Taylor*, 4 Col.

By reference to the record in this case it will be seen that it is an appeal from the judgment above. There is no statement on appeal. The only thing that purports to be a statement is a paper, dated May 24, 1881, to which a certificate of the judge is appended, following which is a notice of motion for new trial, filed on the same day, and a motion for new trial, filed May 27, 1881, which was overruled.

The appellant, therefore, under the California decisions, is limited to the judgment roll alone, of which the statement on motion for new trial forms no part, no appeal having been taken from the order overruling it, leaving nothing but the pleadings to be reviewed. *Thompson v. Connolly*, 43 Cal. 636; *Burdge v. Gold Hill Mining Co.* 15 Cal. 198; *Reynolds v. Lawrence*, id. 361.

Again, no errors are assigned in the statement, and none are anywhere assigned, except in the notice and motion for new trial, which have no place in the transcript, it being only an appeal from the judgment. *Bennett v. Pacheco*, 37 Cal. 408; *Crosset v. Whalan*, 44 Cal. 200.

Again, even if there had been a statement on appeal, embodying the precise matters set forth in the statement on motion for new trial, it would be insufficient to authorize the court to take notice of the evidence "proposed" to be introduced. See Record, p. 25.

The offer does not disclose by whom appellant proposed to prove the matters mentioned, or that the wit-



ness or witnesses were present; nor were any questions asked.

We understand it to be the inflexible rule that a party offering to prove facts must present his witness, and ask his questions, if he wishes to avail himself of an exception to the overruling of a question, or the exclusion of evidence.

In this case no such course was pursued.

As to the instruction asked for by appellant, there is nothing in the record which saves any question on it. Nor does appellant make any point thereon in his brief.

WADE, C. J. Plaintiff, to maintain his action, offered in evidence the record of his declaratory statement and location of the Alta lode claim, which is in the words and figures following, to wit:

“DECLARATORY STATEMENT.

“*Alta Lode.*

“This lode is situated in Ten Mile Mining District, Lewis and Clarke county, Montana territory, discovered July 26, 1876, by J. H. Russell, and he hereby gives notice that he has located the above named lode under the provisions of the act of congress, May 10, 1872, and claims 1,300 feet westerly and 200 feet easterly from discovery; thence to stake A 300 feet, to stake B 200 feet, to stake C 390 feet, to stake D 1,500 feet, to stake 600 feet, to stake A 800 feet, bounded on the north by the south lines of the Mammoth and Free Speech lodes, and on the south by the north lines of Eureka and Fairview lodes.”

Which was properly verified. Defendants objected to the introduction of this declaratory statement in evidence, which was sustained and exception saved, and this action of the court is the error complained of.

The act under which that location was made requires that the location be distinctly marked on the ground, so that its boundaries can be readily traced, and that the

record thereof shall contain the name of the locator, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument, as will identify the claim.

We held in the case of *Hauswirth v. Butcher*, at this term, that such a location carried with it a grant from the government to the person making the same, and that the record must contain such a description of the claim located, by reference to some natural object or permanent monument, as will identify it. We affirm that decision. The record of location must contain a reference to such objects or monuments. But it is not for the court to say, by merely looking at a record or declaratory statement, what are or what are not permanent objects or monuments; that is matter of proof. A stake or a stone of the proper size, and properly marked, may be a permanent monument. A declaratory statement or record thereof, with a reference to permanent stakes or monuments, which did not exist as a fact on the ground, would not be good, while a defective description in the record or declaratory statement might be cured if the stakes or monuments on the ground identified the claim.

The location in question was bounded on the north by the Mammoth claim, and on the south by the Eureka and Fairview claims. It was not for the court to say, by simply looking at this declaratory statement, that the boundaries of these claims did not sufficiently describe and identify the claim of plaintiff on the northern and southern boundaries. These claims may have been held by patents from the government with corners and boundaries so definite and certain as to leave no question concerning the location of the plaintiff's claim. Whether this was so or not was matter of proof, and the plaintiff ought to have had an opportunity to have supported and made certain his declaratory statement by competent testimony.

The judgment is reversed and cause remanded for a new trial.

*Judgment reversed.*

KINNA AND MING, appellants, v. A. M. WOOLFOLK, respondent.

AGREEMENT WITHOUT CONSIDERATION — *Nudum pactum*. — An agreement by one of three parties to the other two, all three of whom were equally obligated to a fourth party, to procure the payment of their common indebtedness from other resources of an insolvent company, for which they were personal security, is without any valid consideration and void.

Representations of a joint debtor, made to induce his co-debtors to borrow money with which to settle another pre-existing greater obligation, will not render him directly liable therefor. It will be presumed that the principal consideration in such case was the release from their own valid, pre-existing indebtedness.

*Appeal from Lewis and Clarke County, Third District.*

CHUMASERO & CHADWICK and SANDERS & CULLEN, for appellants.

There is practically but one question presented by the record in this case, and that is as to the consideration for the agreement sued upon and set forth in the complaint. Is there a sufficient consideration shown to support the contract, or is it a mere *nudum pactum*? This case has once before occupied the attention of this court (see 3 Mont. 380), and this identical contract was then subjected to judicial consideration and interpretation. It would be a little singular, to say the least of it, if this contract was in fact without consideration, that this court, upon that appeal, should have overlooked the matter, and remanded a case which was based upon a mere barren agreement in writing to the district court for a new trial. The sufficiency of the consideration of this contract is a point distinctly made by the respondent upon the former appeal, and although there is nothing expressly said in the opinion of the court concerning the sufficiency of the consideration, it was a matter within the issues, and which the court must have found in favor of the appellants, or it would not have reversed the judgment, which



was in favor of respondent, and remanded the case for a new trial. This being the case, the former decision becomes the law of this case, upon this question as well as upon every other embraced within the former ruling, and the court will not now depart from it. *Phelan v. San Francisco*, 20 Cal. 45; *Davison v. Dallas*, 15 Cal. 82; *Dewey & Smith v. Gray*, 2 Cal. 376; *Washington B. Co. v. Stewart*, 3 How. 413-424; *Stiver v. Stiver*, 3 Ohio, 18, 19; *Booth v. Commonwealth*, 7 Metc. 286; *Henly v. Rose*, 5 Cranch, 313; *Hosack v. Express, etc.* 25 Wend. 313-364.

2. Upon the question of consideration, however, it seems to us that a good and sufficient consideration is expressed in the very first sentence of the agreement set up: "Whereas John Kinna and John H. Ming have this day joined with me in borrowing the sum of twenty-five hundred and seventy-two and ten one-hundredths dollars," says the defendant in his written contract, and this without doubt was the consideration, and intended to be the consideration, at the time he drew the contract. The testimony shows conclusively that this money was borrowed at the earnest solicitation of this defendant. At that time he was the principal stockholder in the Park Ditch Company, which was insolvent; his credit was utterly thereby impaired, and he could not have borrowed the money had plaintiffs not joined with him in doing so, and thereby given him credit. This was a benefit to him, and was a good and sufficient consideration. See Transcript, pp. 16-31. It is a perfectly well settled rule, that if a benefit accrues to him who makes the promise, it is a sufficient consideration to sustain *assumpsit*. *Miller v. Drake*, 1 Caines, 45; *Powell v. Brown*, 3 Johns. 100; *Forster v. Fuller*, 6 Mass. 58; *Townslly v. Sumral*, 2 Pet. 182; *Hubbard v. Coolidge*, 1 Metc. 92; *Waring v. Ayers*, 40 N. Y. 360.

3. But not only is a direct benefit to the promisor a sufficient consideration to support a contract, but if the prom-

isee sustain any *loss* or *inconvenience*, or subject himself to any *charge* or *obligation*, however small the benefit, charge or inconvenience may be, provided such act be performed, or such inconvenience or charge incurred, at the instance of the party to be charged, or, in the language of pleading, at his request, it is sufficient. *Town-  
sley v. Sumral*, 2 Peters, 182; *Seaman v. Seaman*, 12 Wend. 381; *Lent v. Padelford*, 10 Mass. 230; *Train v. Gold*, 5 Pick. 380; *Violet v. Patton*, 5 Cranch, 142; *Glasgow v. Hobbs*, 32 Ind. 440.

There is no contradiction in the testimony that the note to the bank was executed at the urgent solicitation of this defendant. So anxious was he to procure its execution and borrow the money at the bank that he falsely and fraudulently pretended to appellants that he had called his board of trustees of the Park Ditch Company together, and had had them pass a resolution pledging the receipts of the company for the year 1875 to them as indemnity for the execution of the note in question. Can it be said, or if said, can it be believed, that the defendant would manifest so much anxiety, would in fact lay himself liable to a prosecution for obtaining money upon false pretenses, to procure an act to be done which was of no benefit to himself? But were the appellants injured by signing the note? They incurred an *obligation* to the First National Bank, and that, in and of itself, was a sufficient consideration to support the contract; but it is apparent from the testimony that the indebtedness to Hale was not drawing interest, that is to say, the sum which they had guarantied to be paid, whereas the indebtedness to the bank drew interest. Mr. Kinna testifies: "I paid one-third of the amount of the notes with interest." See Transcript, p. 28.

It should be remembered, in this connection, that this is not a question of *adequacy* of consideration, but whether there was *any* consideration to support this agreement; and in this regard the language of the court in *Hubbard*

v. *Coolidge*, 1 Metc. 92, is peculiarly applicable: "*We cannot estimate, as the parties could, the benefit to one, or the inconvenience to the other. The law does not nicely weigh the amount of benefit to one party, or injury or loss to the other, which will make a legal consideration.*"

Another fact, which should not be overlooked in this connection, was that this transaction not only embraced the borrowing of money to pay an indebtedness for which appellants were liable to Hale, but also the sum of between six and seven hundred dollars for taxes, and for which they were not theretofore liable. See Transcript, pp. 18 and 28, and also the contract set out in the complaint. This certainly was a sufficient consideration, if there had been none other.

4. As to the other points in respondent's motion for a non-suit, they hinge entirely upon this question of consideration. It is alleged that appellants were not damaged, because under any circumstances they would have had to have paid Hale, and it is not to be understood thereby that the failure on the part of respondent to fulfil his written contract with them was not a damage to them. As to whether any proceeds of the Park Ditch Company came to the hands of respondent, that is a question of fact for the jury, and there was evidence in the testimony of Mr. Ming, Mr. Kinna and Mr. Hale, showing that certain proceeds of the company came to the hands of respondent that year.

E. W. & J. K. TOOLE, JOHN H. SHOBER and MASSENA BULLARD, for respondent.

The appellants' brief assumes that this is an action on contract, and its authorities are confined to the question of consideration. On the contrary it is an action of deceit, sounding in tort. The instrument sued on, dated September 16, 1874, sets forth that the Park Ditch Company had pledged to plaintiffs and defendant the note of Wm. Chessman, its claim against Felix Poznainsky, and



any other *demands due it*, to the extent of repaying plaintiffs and defendant the sum of \$2,572.10, that day borrowed.

Plaintiffs charge that, in addition to the recitals of the instrument, the defendant, at the time of the execution of the instrument, falsely stated to them that the Park Ditch Company had pledged to them all its resources, including the receipts for water to be sold, and that, by reason of such statements, they were induced to borrow the sum of \$2,572.10 and pay the same to R. S. Hale. They further charge that, by reason of such representations, the defendant is estopped from denying the truth thereof. Record, pp. 4, 5, 6.

The defendant in his answer does not deny making the statement that the note of Chessman and the claim against Poznainsky were pledged to plaintiffs and defendant, but only denies to the extent of the charge that he stated that all the resources of the Park Ditch Company, including the future receipts for water, were so pledged, and denies that he is estopped from proving that no resolution pledging the receipts of water for the year 1875 was ever made by the Park Ditch Company. See defendant's answer, Record, pp. 10, 11, 12.

It will be seen from the pleadings and evidence, as well as from the record of the former trial (3 Mont. 380), that there is no issue as to the pledge of the assets recited in the instrument, but only as to receipts of the Park Ditch Company for water sold during the year 1875. Although the recitals of the instrument sued on limit the pledge of the Park Ditch Company to "*demands due it*," the plaintiffs were permitted to testify as to other verbal statements, which they claimed were made at the time of its execution by defendant, in which they report him as representing that the future and uncertain receipts for water during the year 1875, instead of "*demands due*," were also pledged to them. They not only enlarge, but contradict the recitals of the instrument, as to what was

pledged by the Park Ditch Company, and then seek to hold defendant responsible for the falsehood, not of the recitals which he himself made in writing at the time, but of those which plaintiffs claim that he verbally made.

Passing by the question of plaintiffs' right to contradict the recitals of the instrument sued on, and basing their cause of action upon the parol clauses grafted on to the instrument by themselves, yet even then the plaintiffs have failed in every essential particular to make a case against defendant. The action is based upon the false representations claimed to have been made by defendant. To make such false representations the basis of an action, it was necessary to show:

1st. That the defendant, by making them, betrayed a confidence which the plaintiffs placed in him, and that their relations were such that plaintiffs had the right to rely upon such representations.

2d. That the plaintiffs were destitute of all information, and the means of acquiring it, as to what had been pledged by the Park Ditch Company.

3d. The plaintiffs must also have been misled by the representations, to their injury.

4th. The plaintiffs must have relied solely upon the representations and been influenced to do an act which they would otherwise not have done. See Story's Equity Jur. secs. 192-8, 201-3; *Boggs v. Merced Mining Co.* 14 Cal. 279; *Davis v. Davis*, 26 Cal. 23; *Bowman v. Cudworth*, 31 Cal. 148; *Martin v. Zellerbach et al.* 38 Cal. 300.

- In every one of these important essentials, plaintiffs have failed. Both they and the defendant were securities alike for the Park Ditch Company. It was a corporation, as admitted by the pleadings. Record, p. 11. There is nothing in the record to show that defendant occupied any peculiar relation of trust with reference to plaintiffs.

As to the means of information, there is nothing in

the evidence to show that the records of the Park Ditch Company were not equally accessible to plaintiffs and defendant. The law requires such records to be open to inspection, and plaintiffs do not claim that they were debarred from any such privilege. Certainly, too, the language of the very instrument on which they sue, in which these future water receipts are not enumerated, but plainly excluded, was sufficient to put them on inquiry.

But upon the proposition that they were misled to their damage or injury, the plaintiffs especially fail to make out a case. They and the defendant were alike securities for the Park Ditch Company to R. S. Hale for between \$16,000 and \$18,000, bearing two per cent. per month. They confess the Park Ditch Company was insolvent; that they were uneasy and notified Hale to sue, and only withdrew the notice when they were able to consummate an arrangement with Hale that the receipts of 1874 should be assigned to him, and that, if he received \$8,000 from the resources of the company during the season of 1874, he would buy in the ditch and release them from liability as securities — provided they sold it under their mortgage of indemnity. Record, from page 19 to 30, inclusive.

As the ditch was covered by prior mortgages, the plaintiffs did not consider their security at all adequate. Record, pp. 21, 22, 29. At the end of the season of 1874, they still lacked \$2,572.10 of paying Hale the \$8,000 necessary to secure their release, and the plaintiffs both confess that they would have paid this money without reference to any representations of defendant. Record, pp. 24–29. They both confess that by paying this sum they released themselves from the payment of a larger amount, viz., between \$11,000 and \$12,000, and that they paid it largely for the purpose of being released. Record, pp. 24, 29, 30.

They confess that they surrendered no security which



they already had, by reason of any representations of defendant; that they did nothing they would not otherwise have done, and that they were benefited by paying the \$2,572.10, and consummating the arrangement with Hale. Record, pp. 24, 29, 30.

But perhaps the strongest evidence that plaintiffs were in no way influenced by any representations of defendant with reference to the water receipts of 1875 consists in the fact that, when the contest came up between Hale and the Park Ditch Company over these very receipts, in May 1875, neither of the plaintiffs aided in any manner whatever the Park Ditch Company, then confessedly insolvent. On the contrary, Mr. Ming confesses that he furnished Hale an affidavit to enable him to recover the very receipts, the hope of getting which, he asserts, had influenced him to join in borrowing the \$2,572.10. Record, p. 26 (bottom).

The plaintiffs, according to their statement, thoroughly understood the programme by which the defendant expected to hold these receipts of 1875 for the ditch company. They say that it was explained to them that the six months' redemption would not expire until the best of the water season was over, and they were thus partly induced to borrow the money. Record, p. 17 (bottom); also p. 28.

At the time of the contest, in May, 1875, over these receipts, with R. S. Hale, the plaintiffs fully believed that they were entitled to them according to their statement. Their complaint says that they did not discover that said receipts for 1875 had not been so assigned to them until after the commencement of this action, about June 9, 1877, more than two years after the contest with Hale. Record, p. 5, lines 17, 18, 19, 20, 21. Yet, notwithstanding the importance they attached to these receipts, they gave no sign of their interest, but left the defendant to employ counsel from his own means to contest Hale's right to them. Not until they had been se-

cured for the company by the sacrifices on the part of defendant, enumerated in the record (pages 45 and 46), do the plaintiffs remember the verbal statements of defendant, made in September, 1874, to which they testify nearly eight years afterwards, in contradiction of the plain language of the instrument sued on, and their own conduct in the premises.

Here the defendant might rest, as the plaintiffs relied solely upon the alleged misrepresentations of defendant, and did not even introduce the record of the Park Ditch Company, showing that there had been pledged to them any assets of the company whatever. Doubtless they refrained from introducing this record for the reason that it tallied too exactly with the description contained in the instrument sued on to suit their purposes. Incidentally, however, a portion of the Park Ditch records introduced does refer to the assignment to plaintiffs and defendant. Record, p. 45, lines 6 and 7.

But even on the theory of contract on which the plaintiffs' brief proceeds, they fail to make out a case. They fail to show: First, any benefit to the defendant as claimed. The assertion that defendant's credit was impaired, and that he needed the assistance of plaintiffs to borrow his third of \$2,572.10, has nothing to sustain it in the record. The record does show that defendant was the largest owner in the Park Ditch Company. Record, p. 30 (bottom).

But he was only equally liable with plaintiffs on the security notes to Hale. Hence, in selling out the ditch under the \$8,000 agreement to relieve the plaintiffs and himself from liability, he was sacrificing larger interests than they, although only deriving the same benefit.

The record, too, shows that the \$8,000 agreement was made at the instance of plaintiffs themselves after they had notified Hale to sue on the security notes; that they desired it as a measure of protection, and defendant submitted to it, and they only withdrew their notice to

Hale after this agreement was made. Record, pp. 22, 23, 27.

Plaintiff Kinna confesses that he does not know what motive the defendant had to want to carry out an agreement which plaintiffs had inaugurated and close out the ditch. Record, p. 30 (bottom).

But, secondly, the plaintiffs' brief equally fails to show any damage or injury to them. It is alleged in the brief that they were induced by defendant's representations to incur an obligation to the First National Bank in borrowing the \$2,572.10. But they were required to pay this sum during the mining season of 1874, in order to secure their release from a larger liability. Record, p. 22, lines 21, 22. They did not pay this sum till September 14, 1874, when the mining season was over. Record, p. 2, line 14 *et seq.* There is nothing in the record to show that they could not have paid the money direct without borrowing it, had they been so disposed.

Mr. Kinna acknowledges that he was not flush in funds at the time, and would have been compelled to borrow his portion of the amount regardless of any representations made by defendant. Record, pp. 29, 30. In any event the plaintiffs allege that they paid their portion of the note within thirty days (Record, p. 6, lines 15, 16), although the very instrument on which they sue precludes any hope or expectation of any receipts under the agreement until the following spring. Record, p. 3, lines 12, 13, 14. So far as the record shows, the borrowing of the money by plaintiffs was entirely voluntary.

As to the other note for \$605 for taxes, referred to in plaintiffs' brief, there is nothing in the record to show why it was executed to R. S. Hale. It might perhaps be reasonably inferred that an insolvent corporation had failed to pay its taxes; that Hale, the mortgagee, had paid them for his own protection, and demanded that these back taxes, as well as his \$8,000, should be paid, before consenting to buy in the ditch and release plaintiff.



iffs and defendant from liability. At all events, the plaintiffs have failed to show that defendant was any more responsible than themselves for these taxes. It was a liability for which they chose to execute their note to Hale. It is conceded that plaintiffs only paid their portion of this note to Hale. Record, p. 18, lines 10, 11.

There is certainly nothing in the record to show that this note for taxes was not executed in payment of a just indebtedness to Hale. Nor is there anything to show that the defendant was benefited either directly or indirectly by plaintiffs executing such note, or that they were induced by any representations of defendant to assume it as an indebtedness, although not responsible for it.

So much for plaintiffs' brief.

In conclusion, it is respectfully submitted on the part of defendant, that, by the very terms of the instrument on which this action is brought, the plaintiffs were not entitled to recover. The liability assumed was conditional. The defendant only agreed to apply on the notes executed by plaintiffs and himself such amounts as he might collect "after deducting costs, charges and expenses." Only to this extent he assumed responsibility. See instrument (Record, p. 3).

It is respectfully submitted that plaintiffs wholly failed to show that defendant received any amount whatever from the resources of the Park Ditch Company over and above costs, charges and expenses. No evidence was introduced for the purpose of charging the defendant except as to the Chessman note, the claim against Poznainsky and the water receipts of 1875.

As regards the Chessman note, it distinctly appears from the record that it was claimed by Mr. Hale, and that no payment was made on it to defendant after the date of the instrument sued on. See Chessman's testimony, Record, p. 31, lines 18, 19, 20.

So in regard to the Poznainsky claim. The plaintiffs have wholly failed to designate the nature and amount of

the claim, or to show that it was received by defendant. The instrument sued on refers to "the claim"—not claims—of the Park Ditch Company against Poznainsky as pledged to plaintiffs and defendant. Record, p. 2.

We are left to conjecture both the amount of the claim and what it was for. We only know from the record that it was a claim existing on the 16th of September, 1874, against Poznainsky and in favor of the Park Ditch Company, and assigned by the company about that date to plaintiffs and defendant.

The evidence of Poznainsky (Record, p. 37 *et seq.*) shows conclusively that he was deeply indebted to the defendant, and never paid, except in notes which he never liquidated. This indebtedness was several years in accruing. But Poznainsky expressly negatives the idea that anything was ever paid by him after September 16, 1874, either in notes or otherwise. He claims to know nothing about the affairs of the mine after that date. Record, p. 39, lines 7 to 14 inclusive.

It will be observed that the claim pledged is against Poznainsky and not against the defendant. The evidence, consequently, of Poznainsky that certain bills for water, during a period of years, had been assumed by defendant long before September 16, 1874, would negative the idea that these constituted "the claim" against Poznainsky. Whatever "the claim" was, Poznainsky's evidence shows that no changes occurred with reference to it after September 14, 1874, the date of the instrument sued on, and it devolved upon plaintiffs to prove that the particular claim pledged to them had been collected by defendant, which they wholly failed to do. No attempt was made to prove that defendant had received any other amounts claimed to be applicable to the payment of plaintiffs' demand against the Park Ditch Company, except the water receipts for 1875. For the purpose of tracing these into the hands of defendant, the plaintiffs themselves introduced the records of the Park Ditch Company. See Records, pp. 44-46.

These conclusively show:

1st. That such water receipts did not come into the hands of defendant, but were assigned to A. J. Davis, W. C. Gillette and Samuel Schwab, to indemnify them as securities for the Park Ditch Company. Record, p. 44.

2d. That one-half of such receipts, which amounted altogether to \$3,450, were paid out by the company, after settlement with Hale, to T. P. Newton and Massena Bullard in payment for services rendered by them for the company. Record, p. 46, lines 10 to 18 inclusive; also Record, p. 32.

3d. That only \$1,725 of these water receipts was paid by the company to the defendant, which was done in partial payment and satisfaction of the various services and sacrifices made by him to obtain said water receipts for the company. See Record, pp. 45, 46.

The recital of those services and his sacrifices made, including water notes to the amount of \$8,000, certainly shows an abundant consideration for the charge of \$1,725 which was allowed by the company.

The plaintiffs themselves introduced this record. Its recitals stand unimpeached. Even had they not been introduced by plaintiffs, the records of a corporation are the best evidence of its acts, and especially in an action between its members. Angell & Ames on Corp. secs. 83, 679-683; 1 Greenl. on Ev. sec. 493. The plaintiffs, therefore, proved themselves fairly out of court by their own evidence. The defendant had expressly limited his liability in the instrument sued on to such resources pledged as he might collect, after deducting "costs, charges and expenses." The plaintiffs failed to show that he received one dollar of the amounts pledged, and as to the water receipts of 1875, they prove, by the records of the Park Ditch Company, that he only received what was allowed as a "charge" for services and sacrifices in behalf of the company. No evidence was introduced by plaintiffs to show that the charge was unreasonable, and it stands before the court unimpeached. Hence, even holding the



defendant liable to the full measure of responsibility demanded by plaintiffs, he cannot be held accountable under the evidence introduced by plaintiffs themselves upon the instrument sued on.

WADE, C. J. This is an appeal from a judgment of non-suit. The complaint alleges that on the 16th day of September, 1874, the plaintiffs and defendant entered into a contract in writing, as follows:

“HELENA, September 16, 1874.

“Whereas, John Kinna and John H. Ming have this day joined with me in borrowing the sum of (\$2,572.10) twenty-five hundred and seventy-two and  $\frac{10}{100}$  dollars for the purpose of paying R. S. Hale the balance of eight thousand dollars due him under private agreement with said Ming, Kinna and Woolfolk, in order for their release from certain notes executed by them to said Hale as security for the Park Ditch Company; and whereas the Park Ditch Company has pledged the note of William Chessman to it, and its claim against Felix Poznainsky, and any other demands due it, to the extent of repaying to the said Ming, Kinna and Woolfolk the sum of \$2,572.10, this day borrowed: Now, therefore, the said Woolfolk does hereby agree that if he should collect any of the above amounts, or shall, from any resources whatever of the Park Ditch Company, receive any other sums, after deducting all costs, charges and expenses, to apply the same in payment of said note, and also another note executed to R. S. Hale for taxes, amounting to between six and seven hundred dollars, until said notes shall be fully paid; said payment to be made by the said Woolfolk after his return from the east next spring, and as soon thereafter as the amounts shall be received; but the said Woolfolk does not assume to pay said note only to the extent that he shall receive such amounts from the resources of the Park Ditch Company, as aforesaid.

(Signed)

“A. M. WOOLFOLK.”

Which agreement was then delivered to the plaintiffs. And it is further alleged that, as an inducement to the plaintiffs to join Woolfolk in borrowing said sum of money, and thereby to procure the release of the plaintiffs and defendant from certain notes by them jointly executed, and to pay said Hale the sum mentioned in the agreement as due to Hale, the defendant, prior to and at the time of the receipt of the agreement by plaintiffs from the defendant, and the borrowing of the sum of \$2,572.10 by them, stated and represented to the plaintiffs that the Park Ditch Company had passed a resolution in conformity with the recitals in the agreement, and relying upon the truth of the representations so made by the defendant, and solely induced thereby, the plaintiffs did execute, together with the defendant, their promissory note for the sum of \$2,572.10, and borrowed that sum, which was paid to Hale. And the plaintiffs further aver that until long after the maturity of such note and payment thereof by them, they were ignorant of the fact that the representations of the defendant were untrue and that no such resolution had been passed by the Park Ditch Company, which the defendant well knew, and he is therefore estopped from denying and proving that, in fact, no such resolution had been passed. The plaintiffs further aver that at the maturity of the note for \$2,572.10, they paid two-thirds of the amount thereof, together with interest thereon, amounting to the sum of \$1,810.14, and also paid two-thirds of the note mentioned in the agreement as due Hale for taxes, amounting to the sum of \$445.50. The complaint further charges that the defendant returned from the east in May, 1875, entered into and took possession of the Ditch Company, and received for water sold therefrom for that season, and from the Chessman note, the sum of \$3,500, which he should have applied in payment of the sums of money so paid by plaintiffs to Hale, and that he failed to do so; wherefore the plaintiffs demand judgment against him for the sum of \$2,255.64.

The answer of the defendant admits the execution of the agreement, but denies that there was any valuable consideration therefor, or any consideration except as in the agreement set forth, and specifically denies each and every other allegation contained in the complaint.

Upon the trial, Ming, one of the plaintiffs, testified as follows: "I am one of the plaintiffs. I know Alex. M. Woolfolk. He was the chief manager of the Park Ditch Company in the fall of 1874. I do not know that he was superintendent. Kinna and myself had a conversation with him the day before, or on the same day of the date of the agreement mentioned in complaint. The conversation took place in my office, in the rear of my store in Helena, Montana territory. Defendant said that the balance of the \$8,000 which we owed Mr. Hale was due, and that the Ditch Company had not the money to pay it, and that he had a plan to propose, or a proposition to make, by which we could pay it without incurring any loss to ourselves. That if we would join him and give a note to the First National Bank, and borrow the money, he would get the company to turn over the receipts for water to be sold the following season, and any other sums they might be able to collect to reimburse us in the amount, which was \$2,572.10, and also a note which had been given for taxes of over \$600. I told the defendant that we could not get the receipts from the ditch, if it was sold in January under the mortgage, as it would be, probably. He then explained to us the provisions of the redemption law, giving us six months to redeem in, after the sale, and said that we could hold the ditch for that time, and that two months of it would be the best of the water season, in which he could collect sufficient money, after paying all expenses, to reimburse us and pay us back fully the sums mentioned. We agreed to do this, if the company would pass a resolution pledging us the receipts for 1875 for this purpose. The defendant then left, but returned the same day, and brought us the



contract set forth in the complaint, signed by himself, and told us that the company had held a meeting and passed a resolution in accordance with his proposition and this agreement. Kinna was present at this time, and we then signed the note for \$2,572.10, which note we afterwards paid, and also the note for \$605 given for taxes. Kinna, Woolfolk and myself each paid our part of these notes. Defendant returned in the spring of 1875, and, I think, took charge of the Park ditch. The only knowledge I have of the receipts of the Park ditch for the year 1875 was contained in a written proposition made by the defendant to Mr. R. S. Hale, which statement is now lost. I saw it once. It was in the handwriting of the defendant, with which I am well acquainted. In that writing it was stated that the net receipts of the ditch for the year 1875 were \$3,500, or about that sum. At the time of borrowing the money, I accepted the statement of the defendant that the company had passed the resolution pledging the water receipts of 1875 to us as true, and I relied upon them, and in consequence thereof executed the note. I did not learn that this statement was false until the following season, when I ascertained that defendant had attempted to pledge the receipts of that season to Mr. Geo. W. Fox, to secure a private indebtedness of his own. I accepted this representation as true, and was thereby induced to sign the note to raise the money."

On cross-examination the witness testified as follows: "I do not remember the date when I discovered that no such resolution had been passed by the company, but it was upon the occasion named. At the time of giving our note to the bank we were responsible to Mr. Hale for between \$16,000 and \$18,000. We had an agreement with him that if we paid him \$8,000, of which this \$2,572.10 was the balance, he would release us from all liability. At the time we made the agreement with Hale for the payment of \$8,000, and our release from all lia-

bility to him, I regarded the Park Ditch Company as hopelessly insolvent. There was a mortgage of \$6,000, and one of \$3,600, to Hale upon the ditch, bearing interest at two per cent. per month from 1871 or 1872, the principal and interest on the notes due Hale amounting to about \$15,000, which was secured by mortgage upon the ditch. Mr. Hale held other notes of the company, amounting to between \$16,000 and \$18,000, for which Kinna, Woolfolk and myself were security. We had no security except an indemnity mortgage on the ditch, which was subordinate to the other mortgages to Hale upon the ditch which I have mentioned. This indebtedness for which we were security was bearing interest at the rate of two per cent. per month. In the fall of 1873 Mr. Kinna and myself were uneasy on account of our large liability for the company for which we felt we had no security. We notified Hale at that time that he must take steps at once to collect this indebtedness against the Park Ditch Company, and that if he did not do so, we would be no longer responsible to him as sureties upon the notes. After we gave this notice there was a meeting of the trustees of the Ditch Company, to which I communicated a conversation which I had had with Hale, in which Hale proposed that if the company would assign the receipts of the season of 1874 to him, and we would during said season pay to him from the resources of the company the sum of \$8,000 upon the indebtedness for which we were sureties, and would then sell the Park ditch under our indemnity mortgage, that Hale would bid at the sale of the ditch a sum sufficient to pay the amount for which we were security, and would discharge us from further liability to him thereon. Kinna and myself were in favor of this arrangement and Woolfolk also consented to it. The trustees of the company then passed a resolution in accordance with that proposition, pledging the receipts of 1874 to Hale, and Kinna, Woolfolk and myself made an agreement with Hale with

reference to the \$8,000 payment and our release upon selling the ditch thereafter under our mortgage. My recollection is that Mr. Hudnall, as agent of Mr. Hale, was to collect the receipts under the agreement, which were all the receipts of the Park ditch, and one-third of the receipts of the Tucker Extension, the remaining two-thirds of the Extension receipts belonging to Woolfolk. During the year 1874, the total net receipts of the Park Ditch Company only amounted to about \$3,500. This amount was increased by the sum of about \$2,000, which I had formerly collected as treasurer and accounted for at this time. The total still lacked \$2,572.10 of paying the \$8,000 to Hale, in order to secure our release under the agreement. The receipts of the ditch in 1874 were not sufficient to pay the interest on the company's indebtedness. We were bound to pay this \$2,572.10 in order to secure our release from the indebtedness for which we were still security to Hale, and which amounted, after deducting the payments then made, to about \$11,000 or \$12,000. We would have paid this \$2,572.10 to Hale, as it was necessary to secure our release from our indebtedness to him, whether the receipts of 1875 had been assigned to us or not. We might not have borrowed the money if the statements of Woolfolk had not been made to us. If we had not borrowed the money, we would have simply walked up to Mr. Hale and paid him the money instead of borrowing the amount. We would have been compelled to pay him in some way, for he had our notes and we desired to be released. There was an agreement by the Park Ditch Company to make no defense to our action of foreclosure. I do not remember why the ditch was not sold until the 20th of January."

Kinna, plaintiff, testified as follows: "Ming, Woolfolk and myself were securities for the Park Ditch Company for \$16,000 or \$18,000 to R. S. Hale. Hale had agreed that if the Park Ditch Company would pay him that season \$8,000 on the debt, he would release us as



sureties, or would buy in the ditch so as to release us, if we sold it under our mortgage of indemnity. The Park Ditch Company had paid, at the end of the water season of 1874, all of the \$8,000 but this \$2,572.10, and we borrowed this amount from the National Bank in order to pay the balance of the \$8,000 and thus secure our release. If we had not paid this amount, we would have had to pay the balance of the \$16,000 or \$18,000 for which we were liable as security to Hale for the company. We were compelled to pay the \$2,572.10 out of our own pockets, or else have remained responsible for \$11,000 or \$12,000, the balance for which we were responsible as security to Hale. To a considerable extent I was induced to join in borrowing this money in order to be released from our liability to Hale as sureties. I did not consider the Park Ditch Company solvent. I did not consider that the mortgage of indemnity to us from the company was any security to us for the indebtedness for which we were liable as its sureties. I can't say, as Mr. Ming says, that I would have paid my part of the \$2,572.10 in cash if no representations had been made by defendant. As I was not very flush in funds at that time, I should probably have borrowed my portion of the money to make up the \$8,000 to Hale, if no representations had been made by Woolfolk. Of course, my principal object in borrowing the \$2,572.10 was to get released from the \$16,000 or \$18,000 security debt to Hale. I did not relinquish any security I held against the Park Ditch Company in consequence of the representations of Woolfolk or the paper sued on. We still held our mortgage of indemnity, which was the only security we had. I was very glad to get the matter settled, and get out of our liability to Hale. I considered that in paying the \$2,572.10 I was paying what I had to pay, and was saved, by doing so, from paying a larger sum to Hale. I think the note for \$2,572.10 was paid by us shortly after its execution. I do not know what motive Woolfolk had in making the

representations that the water receipts of 1875 had been pledged to us by the company. He owned the largest interest in the company, and I suppose wanted to hold on to it as long as possible. I don't know why he wanted to close it out to Hale in order to get released from his third of the liability to him."

The foregoing was all the testimony in the case tending to show any consideration for the agreement sued on, and all in relation to any representations by defendant whereby plaintiffs were induced to enter into said agreement. At the conclusion of the testimony, the defendant moved for a non-suit for the reasons, among others: First, that there was no sufficient case made to go to the jury. Second, that there was no consideration shown for the execution of the agreement. Third, because no damage had been shown by reason of the alleged misrepresentations. Fourth, because the testimony shows that the plaintiffs, alike with defendant, were benefited and not injured by the \$2,572.10 paid; and fifth, that the parties were under a legal obligation to pay said \$2,572.10, and gave up no securities, placed themselves in no worse condition, and were in no way injured by the payment thereof or by reason of misrepresentations, if any were made.

The court granted the motion for non-suit, and this motion is assigned as error.

1. Was there any consideration for the agreement?

From the testimony it will be seen that in the fall of 1873 the Park Ditch Company was indebted to Hale in the sum of \$16,000 or \$18,000, for the payment of which the plaintiffs and defendant were sureties. The company was insolvent. They—the plaintiffs and defendant—had no security that was of any value. They were uneasy and wished to be released from their liability. They notified Hale to proceed against the company at once or they would be no longer responsible to him as sureties upon the notes he held against the company. Hale pro-

posed that if the company would assign the receipts of the season of 1874 to him, and the plaintiffs and defendant would make up to him what such receipts fell short of making the sum of \$8,000 upon the indebtedness for which they were sureties, then upon a sale of the ditch upon their indemnity mortgage Hale would bid at the sale a sum sufficient to pay the amount for which they were sureties, and discharge them from any further liability to him. This arrangement was consummated. The receipts of the ditch for 1874 were assigned to Hale, and the plaintiffs and defendant agreed to pay to him what such receipts fell short of making the sum of \$8,000. This is the agreement referred to in the contract sued on.

It will be observed that this \$8,000 was a payment upon the indebtedness for which the plaintiffs and defendant were sureties, so that, in whatever part of said \$8,000 they paid, they were simply discharging a legal obligation and liability that was upon them before the contract mentioned in the complaint had been made. Before said contract was made, the \$2,572.10 named therein might have been collected from them, and in paying that sum they were paying a debt that they could not escape paying, and that the contract did not in any manner affect. In entering into this agreement with Hale, to make up what the water receipts for 1874 fell short of making the sum of \$8,000, they were contracting to pay so much on an indebtedness they already owed, and by the payment of which they made good their mortgage and relieved themselves from an indebtedness of \$16,000 or \$18,000. In borrowing this \$2,572.10 and making this payment, the same was as much for the benefit of plaintiffs as the defendant, and all the basis that the contract sued on has is the fact that they borrowed that sum for the purpose of making such payment. The promise of the defendant to refund the money so borrowed was a mere naked promise without consideration. The contract which



is made the basis of this action, and which expresses the consideration upon which the plaintiffs rely, is as follows, to wit:

“Whereas, John Kinna and John H. Ming have this day joined with me in borrowing the sum of \$2,572.10, for the purpose of paying R. S. Hale the balance of \$8,000 due him under private agreement with said Ming, Kinna and Woolfolk, in order for their release from certain notes executed by them to said Hale as security for the Park Ditch Company.”

There is nothing in this but that three equal debtors joined together to borrow, and did borrow, money to pay a debt for which they were severally and jointly liable. It is not possible that so far there is any promise of or liability for Woolfolk to repay to Kinna and Ming their share of the money so borrowed and paid on their joint indebtedness.

The contract further recites: “And whereas the Park Ditch Company has pledged the note of William Chessman to it, and its claim against Felix Poznainsky, and any other demands due it, to the extent of repaying the said Kinna, Ming and Woolfolk the sum of \$2,572.10, this day borrowed.” This is vague and uncertain; but if anything can be ascertained in favor of plaintiffs, it is that the Park Ditch Company had theretofore pledged to Kinna, Ming and Woolfolk the notes therein mentioned to repay them the sum of \$2,572.10 that day borrowed. But it is not seen, and cannot be seen thus far, wherein Woolfolk promised to pay anything to Kinna and Ming.

The contract continues: “Now, therefore, the said Woolfolk does hereby agree that if he shall collect any of the above amounts, or shall, from any resources of the Park Ditch Company, receive any other sums, after deducting all costs, charges and expenses, to apply the same in payment of said note, and also another note executed to R. S. Hale for taxes, amounting to between six and seven hundred dollars, until said notes shall be fully paid.”

It is apparent from plaintiffs' complaint that the note for \$600 to Hale was paid off by Kinna, Ming and Woolfolk. But it is said, "in payment of said note." What note? It could not be a note of Woolfolk to Kinna and Ming, or they would proffer it or show cause of its absence. Where the contract says, "said note," and also another note executed to R. S. Hale, the legal intendment is that both notes were the property of Hale; but this cannot be so, or these plaintiffs would not sue to recover on it without so stating in their complaint. From this examination of the latter clause of the contract, it is again seen conclusively that the whole matter was without consideration and void. And if the defendant did promise to pay "said note," and another note, in what does the consideration consist? None is mentioned in the writing. It was a mere naked promise for the payment of an uncertain amount out of uncertain proceeds, to uncertain parties in an uncertain manner, and at an uncertain time, without consideration in law and void.

2. Appellants, in their brief, rely upon the fact that: "This case has once before occupied the attention of this court (see 3 Mont. 380), and this identical contract was then subjected to judicial consideration and interpretation. It would be a little singular, to say the least of it, if this contract was in fact without consideration, that this court upon that appeal should have overlooked the matter, and remanded a case which was based upon a mere barren agreement in writing, to the district court for a new trial."

- Appellants further say: "Although there is nothing expressly said in the opinion of the court concerning the sufficiency of the consideration, it was a matter within the issues, and which the court must have found in favor of appellants." The matter of the consideration could not have been an issue in this case, for whatever were the real facts in the case, the learned judge who delivered the opinion in the case, after setting out the contract,

says: "Said Ming and Kinna brought this action to recover from said Woolfolk the sums that are mentioned in the contract, and were paid by them to Hale."

Again, the opinion states, on page 385: "It appears that the appellants and respondent borrowed of R. S. Hale the sum of \$2,572.10," etc.

It is not necessary to proceed further in a comparison of the cases, to see that a different case would exist if the money had in fact been borrowed from Hale, and respondent had agreed to pay the note which was given as the evidence of the debt. This is not the case.

Judgment is affirmed, with costs.

*Judgment affirmed.*

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RYAN, respondent, v. DUNPHY, appellant.

**STATUTE OF FRAUDS.**—An express verbal contract for the sale of real estate is void under the statute of frauds in force in Montana.

Whenever, in the progress of a trial, this fact appears, objection to all testimony as to the nature and substance of such contract will be sustained by the court.

Such contract could not be the basis of an action in equity to enforce a specific performance, and no more can it be the basis for a counter-claim or cross-action.

Every contract must be mutual as to remedy and obligation, and will not be enforced against one who has not the power to enforce it in his own behalf.

Where an express verbal contract is pleaded, the action cannot be sustained as on an implied contract for money laid out and expended at the instance and request of respondent.

**PLEADING.**—The rulings of a court will be presumed to be based upon the state of the pleadings.

*Appeal from Third District, Lewis and Clarke County.*

CHUMASERO & CHADWICK, for appellant.

This action was commenced on the 16th day of December, 1879, to recover judgment against the defendant on a



promissory note made by him and payable to plaintiff, said note bearing date June 1, 1879, payable December 1, 1879, for \$1,511.50. The defendant in his answer admits the execution of the note, and sets up as a counterclaim, or for a cross-action, the following facts: That in February, 1879, one Embry and one Rumsey were the owners of a certain placer mining claim, together with water rights, flumes, etc., and that defendant was negotiating for the purchase of the same, or certain interests therein. Whereupon the defendant and said plaintiff, at the instance of plaintiff, entered into a parol agreement, whereby it was agreed and stipulated that the defendant was to effect a purchase of two-thirds of the said property on the best terms possible; that he was to negotiate for such purchase, make the payment of the consideration therefor, and take necessary conveyances for the two-thirds of said property in his own name, but on the joint account of plaintiff and defendant. That plaintiff was not to be known in the said purchase until completed, when he was to pay the defendant one-half of the amount laid out in acquiring such title; and defendant was to make a good and sufficient deed to plaintiff for one of the said two-thirds so purchased. That the parties hereto consulted together from time to time as to the consideration to be paid, and agreed on such amount. That defendant effected such purchase, and received a good and sufficient deed for two-thirds of the premises. That, when everything was completed, defendant and wife made a good and sufficient deed to plaintiff for one-third of said property, and demanded the payment of one-half of the amount so expended; but plaintiff refused to receive the same, or to pay the said one-half of the purchase money, which amounted to \$1,985.61. See Record, pp. 3 to 9, inclusive.

Upon the trial the defendant, having the opening of the case, offered to prove the facts above stated, and for that purpose placed witnesses upon the stand, and inter-

rogated them; but counsel objected to the same upon the ground that this contract, being verbal, came within the provisions of our statute of frauds.

The court sustained the objection; to which ruling the defendant duly excepted, and had bill of exceptions signed. See Record, pp. 10-12. And this presents the only question — save as to the statute not pleaded — to be decided by this court. Was the counterclaim or foundation for the cross-action a valid or legal one, or was it invalid under our statute of frauds? If it had been an equitable action to enforce the specific performance of this contract, then the position of the respondent might have been sustained; but this counterclaim, being the same as an independent action for money paid, laid out and expended by defendant at the instance and request of the plaintiff, the statute of frauds has no application. In the court below this action was tried and decided as if it was an action for specific performance of a verbal contract relating to lands, and without any consideration of the state of the pleadings; and all of the authorities cited by the respondent's counsel only applied to an action of that character. Respondent's counsel relied upon the decision of the court in 1 Am. Rep. p. 14; 4 Wall. 517; 39 Cal. 109, and Browne on Frauds, sec. 262.

The first case cited from American Reports is a case from 31st Maryland, and was an action to compel a specific performance. The case is, in law, nearly analogous to this; and the court, in denying the specific performance, say: "But a court of equity (law and equity are not blended in that state) may, in cases where parties are not entitled to specific performance, grant relief by decreeing the repayment of the money expended on the faith of the contract;" and cite many authorities in support of this. Then under our Code of Civil Procedure, the appellant herein could have maintained an action for the money expended; and it necessarily follows that it

was properly set up as a counterclaim to the plaintiff's action, being on a contract between same parties.

The second case cited, from 4th Wallace, was also for a specific performance of a parol contract for the exchange of lands. Nothing had been paid by either party, and therefore has no application to the case at bar.

The next case cited was from the 39th California, 109. This case is where a verbal sale had been made of certain lands, the consideration paid, the vendee had entered into possession, and the court decreed that the defendant should execute a deed. How this authority touches this case is beyond our comprehension.

The next and last authority is sec. 262 from Browne on Frauds. We fail to see what this section contains that has any bearing on this case, and submit it to the consideration of the court.

These authorities were read upon the trial, not examined or criticised, and none produced by appellant, and were hastily reviewed by the court, and the defendant below not allowed to prove the oral contract, and the amount of money paid, laid out and expended at the instance and request of the plaintiff below. And this is assigned as error.

We assert the proposition of law that no authority can be found that is in point, wherein any court has held that the statute of frauds would in any manner defeat an action for the recovery of the money so expended, or defeat a counterclaim in an action where it was properly set up and pleaded. See *Wetherbee v. Potter*, 99 Mass. 354; *Phillips v. Thompson et al.* 1 John. Ch. 131; *Parkhurst v. Van Cortland*, id. 273; *Coughland v. Knowles*, 7 Met. 57; *Baker v. Wainwright*, 36 Md. 336 (cited in 4th vol. U. S. Dig. [N. S.] p. 695, sec. 3); *Allen v. Booker*, 19 Am. Dec. 33; *Flagg v. Mann*, 2 Lunn. Cir. Ct. 486; 1 Wall. Dig. p. 554, sec. 216.

Under the agreement set forth in the answer, and not denied, the appellant acted as the agent of respond-



ent as to the one-half of the premises purchased, and therefore the statute of frauds would have no application. *Switzer v. Skiles*, 3 Gil. 529; *Johnson v. Dodge*, 17 Ill. 433.

The statute of frauds must be pleaded. See case last cited, and *Browne on Frauds*, sec. 508, and authorities there cited.

The appellant calls the attention of the court to the fact that the counterclaim or cross-complaint was never in any manner denied by the plaintiff, no replication having been filed. Therefore the facts therein stated are admitted to be true. And as the plaintiff had the opportunity to plead the statute of frauds by replication, he cannot avail himself of its benefits. *Moak's Van Santv.* Pl. pp. 505, 555, 867; *Harris v. Knickerbocker*, 5 Wend. 638; *Goelet v. Cowchey*, 1 Duer, 132; *Duffy v. O'Donovan et al.* 46 N. Y. 223-7; *Cozine v. Graham*, 2 Paige, 177.

The rule is well settled that the party against whom the contract is claimed to run must either deny the making of it, or, if he admits it and relies on the statute of frauds, he must plead it. The plaintiff not having denied the making of the contract, and not having pleaded the statute, then it may be true that the court did not err in refusing to allow the contract to be proved, but it, the evidence, was rejected upon the ground that such contract was void.

But there was manifest error in the court ordering judgment for the plaintiff for the amount of the claim; the order should have directed judgment to be entered for the defendant for the amount that his counterclaim exceeded that of the demand of plaintiff, and this court should reverse the judgment entered, and order judgment for the defendant for such excess.

E. W. & J. K. TOOLE, for respondent.

1. The cross-complaint and counterclaim in this case is based upon the contract. It alleges what it was, and

seeks to enforce it against respondent by reason of a compliance on the part of the appellant. It was the contract so set up that was sought to be proven on the trial, and to *the refusal of the court to allow this, alone, do the exceptions go.*

Where a party pays money or renders services to another upon a contract void under the statute of frauds, it has always been held that he can recover for money had and received, or upon a *quantum meruit*. But in such case the contract is disregarded, and the action is based upon the implied promise to pay. An action upon *the contract* in this case can no more be maintained than it could upon *one* where it had only been partially performed by the complaining party. In such case his remedy, if he has any, is upon a *quantum meruit* or *quantum valebat*. It is upon the *implied* promise to pay for the benefits received.

Without any concession as to whether such an action could be maintained under the particular facts of this case, it is clear that the maintenance of the action set up in the cross-complaint must necessarily call to its support proof of the alleged contract. It is emphatically a suit upon the contract, and the complaining party must stand or fall upon the establishment of it. Under the common counts, evidence of a contract is frequently admitted as tending to fix the amount for which a recovery may be had. But we confidently assert that no well considered case can be found where a recovery can be had under the common counts when the action is based upon an express contract.

The *very* and *only* point embodied in the exception to be considered is the ruling of the court in not allowing appellant to *prove his alleged contract*. It will be found that the authorities cited by appellant, so far as they are at all in point, support the proposition here announced. 99 M. 360. In addition to these we cite the court to the following, which we contend are conclusive of this case:

Browne on Statute of Frauds (3d ed.), p. 122, sec. 124; *Gray v. Hill*, Ry. & Mood. 420, and authorities cited in notes 3 and 6; Browne on Statute of Frauds, *supra*; *Fuller v. Reed*, 38 Cal. 99 *et seq.*; *Pallen v. Hicks*, 43 Cal. 509 *et seq.*; *Cooper v. Pena*, 21 Cal. 403 *et seq.*; *Albert Dungas v. Willard Parker*, 52 N. Y. 494; *Kidder v. Hunt*, 11 Am. Dec. 183.

The payment of the money in this case, under any circumstances, as disclosed, is equivocal. It was not paid to respondent, but paid by appellant to third parties. It does not, therefore, of itself raise an implied promise as if paid to respondent. In such case it must be evidenced by writing. *Huston v. Townsend*, 12 Am. Rep. 109.

Neither the land or money was received by respondent, and he did no act or thing in furtherance of the alleged contract. There is no allegation or offer to prove that appellant would not have made the contract of purchase but for the agreement of respondent, which is necessary under any circumstances to maintain any action. On the contrary, it appears he was negotiating the purchase, and was to and did use his judgment about it. *Jackson v. Murray*, 17 Am. Dec. 58, and authorities cited in note on that page.

2. As to the authority of an agent in cases cited, it is based upon a section of the statute of frauds, as it was at common law by our statute. Sec. 160, p. 435. The words "by writing" are added to the provisions of the English statute, and the decisions under it are made accordingly. The authorities cited on this point by appellant are consequently inapplicable.

3. The other point made by appellant in reference to the pleading is based upon the supposition that no replication had been filed. In this they were mistaken, and the authorities concur upon the point that, if the *contract set out is denied*, it puts the contract under the statute of frauds in issue as effectually as if pleaded; and when denied, the party, of course, cannot go into proof of his



parol agreement. See Browne on Statute of Frauds (3d ed.), 510, 511, and especially note 3, p. 487, in said book, and authorities there cited; *May v. Sloan*, 11 Otto, 231, top page 237; Sugden on Vendors, 150-54, sec. 6, par. 5.

We contend in this case that no action of any kind could be maintained by appellant. If money had been paid or services rendered to respondent under circumstances where he should repay it upon principles of common justice, a remedy is afforded upon his implied promise to do so. But where he has received no benefit upon which such implied promise arises, as in the case at bar, the contract must necessarily be invoked to support the action. This cannot be done. It was in the power of the appellant to have had the agreement reduced to writing before he took any risk under it. For this purpose the statute of frauds was enacted. Otherwise the innocent and unsuspecting would be at the mercy of the unscrupulous and designing. If A. can come up to B. and say to him, "You authorized me to buy this property of C.; here is your deed for it; now pay me \$50,000, the purchase price, which you agreed to," without any writing on the part of B., or any act except in disaffirmance and denial of the engagement, the bars to fraud, perjury and injustice are thrown open, and the fruits of honest toil and industry are always at the caprice of the indolent and dishonest. A bare thought of the consequences that might ensue is a sufficient reason for the law, if any was required.

#### REPLY OF APPELLANT.

In reply to the brief of the respondent herein we have but a few words and authorities by way of replication.

1st. The brief of appellant was prepared and filed under an honest belief that no replication to the counterclaim set up in the answer had been filed. None was produced on the trial, or was inserted in the record; but it appears that one was filed before the trial and we have

had the same made a part of the record. This in no manner affects the questions presented in our brief, only that it devolved upon the appellant to prove the contract, and for that purpose offered the evidence which was excluded by the court. And this is the error complained of. The respondent claims that a contract that is in conflict with the statute of frauds is illegal and void, and that whenever such a contract necessarily must be relied upon and proven in an action of *assumpsit*, and not for a specific performance, that the action predicated upon it must necessarily fail. We insist that this is not the law. A contract within the provisions of the statute of frauds is neither *void* or *illegal*. See Browne on Frauds (2d ed.), sec. 508, and authorities there cited; also sec. 124. In fact this proposition never has been doubted. And in the case at bar the plaintiff had the opportunity to plead this statute, and not having done so, it stands the same as if it was in writing and valid and binding between the parties. See authorities cited in our brief, last subdivision thereof, and *Thornton v. Vaughan*, 2 Scam. 218; *Burke v. Healey*, 2 Gilm. 614; *Trustees of Schools v. Wright et al* 12 Ill. 432; *Osborne v. Endicott*, 6 Cal. 149, 150.

2d. We only desire to notice one other point made by respondent, to wit: That as the appellant sets forth this contract in his answer as the foundation of his counterclaim, that therefore he must prove it. And if it could not be enforced for the reason that, as respondent claims, it is void or illegal, it could support no action, and the appellant should have declared on a *quantum meruit* or *valebat*.

In the first place, as we have shown, such a contract is not *void* or *illegal*—it only gives the party against whom it is sought to be enforced the right to plead that it cannot be enforced against him by reason of such statute. But as we have already shown by our brief first filed, that, although it cannot be the foundation of an action for specific performance, it may be for the recovery

of money paid and expended, or services performed at the instance and request of the party to be charged; and this is allowed, and the contract is competent evidence to show the request and the terms under which such liability originated. In addition to authorities cited, see *Little v. Martin*, 3 Wend. 221. On careful examination of this case, in which Wm. L. Marcy delivered the opinion, it is decided that the appellant had the legal right to show that he paid this money at the instance and request of the appellant, also upon what terms and conditions it was paid; and to be followed up with proof that appellant had carried out this parol agreement on his part, and was therefore entitled to recover back the money paid, laid out and expended at the request of defendant. It had nothing to do with the specific performance of such a contract, but was competent to show under what conditions this money was expended. See, also, *Clark v. Terry*, 25 Conn. 395, and authorities there cited; *Whitney v. Cochran et al.* 1 Scam. 210.

Another point is made that this cross-action or counter-claim should not be upon the contract, but *assumpsit* on an implied promise to pay; that the action should be upon *quantum meruit* or *quantum valebat*. But we can discover nothing in this point of respondent. It is not, as above stated, an action upon the contract, but the cross-action is the same as the old common count for money paid, laid out and expended at the instance and request of respondent, and was offered in evidence to prove the request and that the appellant had complied with such oral agreement. See authorities above cited. And we may safely state that authorities without number could be referred to in support of our position.

In conclusion, as to the hypothetical case suggested by the respondent, let us present the opposite side of the question. Suppose that A. verbally authorized B. to purchase a lot with buildings situate thereupon in the city of Helena or Butte, or to purchase what is at the time



of the parol agreement supposed to be a valuable mine (as the case at bar); that A. is authorized by B. to make the purchase and to pay the consideration therefor; that A. buys the property and takes the deed therefor for the benefit of B.; the buildings on the city property are burned down, or recent developments show the mine to be valueless, and then A. tenders to B. the amount he has paid, laid out and expended at B.'s request; and B. says our agreement was not in writing; the statute of frauds says, you cannot enforce it; and then A. must lose the money he has paid at the request of B. We submit that no court was ever so devoid of honesty or common sense as to say to A., you have no remedy.

GALBRAITH, J. The complaint in this action is founded upon a promissory note made by the appellant to respondent, dated June 1, 1879, payable December 1, 1879, for \$1,511.50.

The answer of the appellant admits the execution and delivery of the note, and also that the same has not been paid, but alleges, by way of cross-action and counterclaim, in substance, the following state of facts: "That in February, 1879, the appellant was negotiating for the purchase of certain placer mining ground, with the water rights, flumes and appurtenances owned by and in the possession of certain persons, Rumsey and Embry; that about this time, at the request of the respondent, it was (in substance) agreed between the appellant and respondent that the appellant was to effect the purchase of the above property upon the best terms possible, using his best judgment, for the benefit of both parties; that the title thereto was to be taken in the name of the appellant, and that the respondent was not to be known in the transaction till the purchase was completed and the conveyances executed; that when the appellant obtained a title to said property, he was to make to respondent a deed for the undivided one-third thereof, upon the execu-

tion and delivery of which the respondent was to pay to appellant the one-third of all moneys paid by him for such conveyance, and the one-half of all expenses paid out in and about the purchase; that on the 24th of February, 1879, the appellant obtained a deed from Embry for his interest in the property, the consideration therefor being \$2,600; that on the 26th of July, 1879, the title from Rumsey for one-half of the property to the appellant also became perfected; and upon this day the appellant and wife executed a deed to respondent for an undivided one-third of said property, and the same was tendered to respondent, and demand made for the payment of \$1,935.61, being the amount claimed by respondent on account of the purchase and expenses in relation thereto; that respondent denied the existence of the agreement, and refused to pay the money and receive the deed."

The respondent filed his replication, denying the existence of the agreement, or that the respondent was indebted to appellant in the sum claimed in the answer, or in any other sum whatever.

Upon the trial, the appellant being placed upon the stand as a witness, was asked the following question: "You will state whether, in the month of February, 1879, you entered into any contract or agreement with the plaintiff in regard to the purchase of the mining ground in Grizzly Gulch, Minnesota mining district, Lewis and Clarke county, Montana territory." This was the property set forth in the answer.

To this question the witness answered: "I did enter into a contract with plaintiff verbally; there was no written agreement."

The witness was then interrogated as follows: "You will state what the contract was." To this question the respondent objected, for the reason that the agreement, not being in writing, is void by the statute of frauds. The court sustained the objection. The exception to this

ruling of the court presents the principal question for our decision.

It will be observed in relation to the agreement set forth in the answer, and which was sought to be proved by the question propounded, that the property which was the subject thereof was real estate; that the appellant was to obtain it in his own name and make the payment of the consideration therefor; that when the purchase was completed, the respondent was to pay the appellant one-half the amount of the purchase money, who thereupon was to convey one-third of the property to respondent.

The money so paid by the appellant was his own money, and it cannot be considered a loan or advance to the respondent. To take an agreement from the operation of the statute of frauds and establish a resulting trust, the purchase money must be the property of the party paying it at the time of payment. The same rule prevails "where the party taking the deed pays his own money therefor, with the understanding or agreement that it may afterwards be repaid and the land redeemed by him who sets up the trust."

The agreement was therefore a contract within the statute of frauds. Secs. 160-162, 176 and 177 of art. I, ch. 13, 5th division, Revised Statutes 1879, pp. 435-437; *Browne on Statute of Frauds* (4th ed.), sec. 90; *Kendall v. Mann*, 11 Allen (Mass.), 15; *Kellum v. Smith*, 33 Pa. St. 164; *Jackman v. Ringland*, 4 W. & S. (Pa.) 149.

But it is claimed by the appellant that the counterclaim, being an independent action for money paid, laid out and expended by appellant at the instance and request of the respondent, the statute has no application.

To this we think it would be sufficient to reply that the express contract being void by the statute of frauds, the counterclaim founded thereon cannot be sustained.

We understand it to be the general rule, that the agreement must be mutual as to the remedy and obligation, and that a contract will not be enforced against a



party who does not possess the power under the contract to enforce it upon his part.

Upon this agreement the respondent could not bring a bill for its specific performance.

It will be observed that the appellant founds his counterclaim wholly upon the express contract alleged in his answer. Therefore both the supposed bill in equity for specific performance by the respondent, and the counterclaim in question, are founded upon the same express verbal contract. No reason can, we think, be assigned for maintaining that a contract which would not sustain a bill in equity for specific performance, for the reason that it is void under the statute of frauds, would nevertheless, in itself, be sufficient to support an action or counterclaim for the recovery of the money paid out under its provisions.

It was the express agreement alone which the appellant offered to prove upon the trial. It was only to the refusal of the court to allow proof of this agreement that the appellant excepted. The claim of appellant was based wholly upon the express agreement set forth in this answer. He does not claim the sum demanded, or any portion thereof, by virtue of any implied contract, to pay for expenses incurred in and about the purchase. There is no claim in the answer upon what may be technically called a *quantum meruit* or a *quantum valebat*. There is no statement of facts that substantially establishes any such claim under our system of pleading. The proof was not offered for any other purpose than to sustain the allegations of the counterclaim and cross-action. It was the express contract alone which was put in issue by the pleadings.

It will be presumed, therefore, that the court ruled upon the objection in view of the state of the pleadings.

There was a replication denying the existence of the contract set forth in the answer. This required proof that the alleged agreement was in writing. Browne on

Statute of Frauds (4th ed.), sec. 511; *May v. Sloan*, 11 Otto, 231; 1 Moak's Van Santvoord's Pl. p. 674.

The court ruled correctly on the objection.

The judgment is affirmed, with costs.

*Judgment affirmed.*

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RYAN, respondent, v. DUNPHY, appellant.

EVIDENCE — *Books of account — Memorandum books.*—To admit a book of account as evidence, preliminary proof must show that it was a book of original entries in which ordinary business transactions and a course of dealing with various persons appear, entered at the time of the transaction; also that the person making the entries kept true and honest accounts; and the book itself should first be submitted to the inspection of the court.

A memorandum book with the entry of a single sale or transaction, though such entry were made at the time of the transaction, is not such an account book as the law contemplates; it should go no further than to serve to refresh the witness' memory.

Though the rule of the law regarding the interest of witnesses has changed, the reason of the rule as to the admission of book evidence remains the same.

*Appeal from Third District, Lewis and Clarke County.*

CHUMASERO & CHADWICK, for appellant.

This action was commenced to recover the sum of \$323.70 upon a verbal agreement made with reference to the sale of cattle, as alleged by the plaintiff in his complaint. Plaintiff claims that the defendant purchased an undivided one-half interest in a band of cattle, and that the defendant was to pay plaintiff the sum of \$6,829.10, to be secured by note and mortgage, and that in addition thereto he was to pay plaintiff "a bonus" of thirty cents per head; that such promise was verbal, and that no one was present save the parties to the transaction, and that said "bonus" amounted to the aforesaid sum of \$323.70.

Defendant admits the sale, avers that the note and

mortgage were duly executed and paid, but denies that there was any agreement or promise whatever whereby he agreed to pay any further or greater sum than \$6,829.10, and denies that he promised to pay any bonus whatever. Upon this issue a trial was had in the probate court of Lewis and Clarke county and judgment rendered in favor of defendant. Plaintiff appeals to the district court, and there a verdict and judgment was rendered and entered for the plaintiff, and from this the defendant appeals to this court. It will appear from the record in this case that plaintiff testified positively that such a parol contract was entered into, and defendant as positively testified that no such agreement or contract was made. The plaintiff being called to testify in his own behalf, stated that such contract was made, giving the dates, terms, and all of the circumstances surrounding the transaction; not stating that his memory did not enable him to give all of the facts and circumstances surrounding the same, but minutely and particularly stating the same. See Record, pp. 7-9.

After so testifying the witness produced a private memorandum book in which he claimed he had made a memorandum. He had previously stated the transaction fully, and the reference to the memorandum book was not for the purpose of refreshing his recollection or memory, but was offered, read to the jury and received in evidence as independent, substantive and material evidence, notwithstanding the objection of the defendant to such reference, the reading of the same to the jury, and its admission in evidence.

This is the only point that appellant desires to submit to the court. We claim that there is not a case bearing upon this question that would warrant the admission of such evidence. It was not produced to refresh the memory of the witness, as he had already testified to all, and more, than the memorandum contained. It was not a case where the party testifies that he has no recollection



of the transaction, but can testify that at the time of the transaction he knows he correctly made an entry of it in his books, or a memorandum thereof; then, as some authorities assert, in the latter case, the memorandum may be received in evidence; and in the former, when the witness' recollection may be at fault, or not clear, he may refer to the same, but the memorandum itself is not evidence. Take cases similar to the one at bar, where no one is present aside from the contracting parties. One asserts the existence of a contract, the other denies it.

What a door for fraud and perjury would be opened if a party could make an entry of what he claims to be the contract, go upon the witness stand and testify to all of the facts and circumstances entered in the memorandum, and then introduce his manufactured evidence in the form of a memorandum and claim that it made a preponderance of evidence in his favor, as was the fact in the case at bar. It is not claimed that this memorandum was ever read to the defendant, or that he had any knowledge thereof. He states emphatically that no such promise or agreement was entered into; and thereby completely puts this question in issue as to the existence of such a contract.

Authorities without limit might be introduced to show that our position is correct, and that error was committed by allowing the witness to refer to such memorandum after he had testified fully to the contract from his memory or recollection, and in allowing the same to be introduced in evidence. It may seem to be casting a reflection upon the court to refer to authorities in support of the propositions above stated, with which any law student is familiar, but will beg leave to refer to a few leading authorities. See 1 Wharton on Ev. secs. — *et seq.*; 1 Greenl. on Ev. sec. 437 and note; Abbott's Trial Ev. pp. 320-1; *Meacham v. Pell*, 51 Barb. 65; *Russell v. Hudson River R. R. Co.* 17 N. Y. 134; *Marclay v. Shults*, 29 N. Y. 346, 350-5; *Dugan v. Mahony*, 11 Allen, 572; *Young v. Catlett*, 6 Duer, 437.

Innumerable authorities could be added to those above cited, but we believe that it is unnecessary upon a proposition so just and reasonable, and supported by an undisputed array of authorities. It may be claimed by the respondent that this entry was authorized by the defendant; but this is refuted by the testimony, for defendant testifies that no such agreement was ever made; that he bought the interest of plaintiff in the cattle and gave the note and mortgage above mentioned. If defendant authorized anything to be entered in the memorandum, this amount of the purchase money is what was understood. The respondent does not say that, after making the memorandum, he read it over to the appellant, or that appellant was informed of its contents. Respondent could have written anything therein to support an unjust claim. And we find from the memorandum that he did make an entry, stating: "To 1,079 head of stock cattle at 30 cents per head. June 3, 1879." This was the date of the purchase. Why did he not enter the purchase price of \$6,829.10 for which the note and mortgage were to be given? Clearly, he was endeavoring to perpetrate a fraud, and thought by writing this in his memorandum book he would make out a case by preponderance of evidence. But fortunately the law does not sanction such trickery.

This memorandum became of the greatest importance in the case, tried before a jury, but such temporary victory was gained by incompetent evidence being admitted.

Believing that this honorable court will not lose sight of what is competent evidence and what is not, we are satisfied that the judgment in this case will be reversed.

E. W. & J. K. TOOLE, for respondent.

1. Appellant's objections to the admission of the evidence complained of cannot be entertained. He should lay his finger upon the particular grounds of his objection and embrace it in his bill of exceptions. See Revised

Statutes of Montana, pp. 93, 94, secs. 281, 282; *Keller v. Kimbal*, 10 Cal. 267; *Fair v. Jackson*, 8 Johns. 496; *Jackson v. Caldwell*, 1 Cow. 622; *Whitesides v. Jackson*, 1 Wend. 418; *Walus v. Gilbert*, 2 Cush. 27; *Cleveland v. Tanner*, 7 Cal. 38, 289; *People v. Manning*, 48 Cal. 335; *People v. Lang*, 43 Cal. 444; 7 Nev. 377.

2. There is nothing in the point sought to be made, should the court be inclined to consider it. When the recollection of witnesses differ so widely as in this case, the memorandum of respondent, made then and there in the presence of appellant, is a part of the *res gestæ*, and admissible to strengthen the one side or the other.

*Marcy v. Shults*, 29 N. Y. 346 *et seq.*, and all the other authorities cited by appellant, do not militate against this position, but in the main support it. The following are directly in point under the facts in this case: *Rèviere v. Powell*, 34 Am. Rep. 94; 22 N. Y. 462; 15 Wend. 599. See Record, p. 8; *a* Record, p. 8; *b* Record, pp. 9, 13.

#### REPLY OF APPELLANT.

The appellant, in reply to the brief of the respondent, states:

1st. As to the first point suggested in his brief, it is shown by the record that the appellant "did lay his finger" upon the point of his objection to the memorandum book produced by respondent, and more especially to strike the entry contained therein from the evidence. See p. 12 of transcript, lines 4, 5 and 6, which contain the following: "The defendant then moved to strike out and exclude the evidence" (relative to memoranda), "on the ground that the same was incompetent."

2d. As to the second point of respondent, that "when the recollection of witnesses differ so widely as in this case, the memorandum is part of the *res gestæ*," no decision of any appellate court can be found in support of this, nor any work on evidence, where the witness has testified fully from his recollection, and not claiming that



his memory is at fault. Mr. Wharton, in his valuable work on evidence, and other authorities cited by appellant in brief, fully substantiate this.

We find nothing farther in respondent's brief that demands any reply.

GALBRAITH, J. The complaint in this action in substance alleges that the respondent, on the 2d of June, 1879, sold and delivered his interest in certain cattle to the appellant, in consideration of which the appellant executed his note and mortgage on the cattle to respondent, and in addition thereto agreed to pay on demand thirty cents a head upon the cattle, amounting to the sum of \$323.20.

The answer of appellant admits the sale, and avers that the note and mortgage were executed and paid, but that the note and mortgage were the only consideration for the interest in the cattle, and denies that he promised to pay any additional sum whatever.

Upon the trial, which was to a jury, a certain memorandum book and entry therein were admitted in evidence. The entry was as follows: "To 1,079 head of stock cattle at 30 cents per head. June 3, 1879."

This evidence the appellant moved to strike out on the ground of incompetency. The court overruled the objection, to which ruling the appellant excepted.

It will be observed that the objection is made on the ground of incompetency. The point of the exception is therefore particularly stated as required by the Code of Civil Procedure. The exception is not, therefore, subject to the criticism made in the argument of respondent, that the point of the exception is not particularly stated.

The next and only question presented for our consideration is whether or not the above entry was properly admitted in evidence. Before the memorandum book and entry were admitted, the respondent testified particularly and positively as to the terms of the contract, without

reference to the book for any purpose. He then stated that at the time of the agreement, on the 3d of June, he made an entry in a memorandum book of the transaction. On the 3d of June, 1879, I demanded the cash payment that was to be paid as a bonus. Defendant said, "You need not be in such a hurry about it." I then took out my book and said to him, "Shall I make an entry of it?" He said, "Yes, make a minute of it;" and I then did so, and this is the entry so made. The memorandum book and entry therein was then given in evidence.

The defendant testified: "that he bought the cattle on the 3d of June, but that he did not agree at any time to pay plaintiff thirty cents per head additional to the note and mortgage. That prior to the final agreement there was talk about his paying plaintiff thirty cents per head, but no agreement was made, and that, when the agreement was finally consummated, nothing whatever was said about an addition of thirty cents per head, and that the whole sum he did agree to pay was included in the note and mortgage."

It will be observed that no foundation was laid for the introduction of the book by any preliminary proof that it was the respondent's book of original entries. It does not appear that the book was submitted to the inspection of the court. It was not shown that it was a book in which the respondent kept an account of his ordinary business transactions, or a course of dealing with the respondent or other persons. A single sale or transaction entered in the book would not constitute it a book of original entries. Neither was there proof that the respondent kept true and honest accounts. To entitle the entry in the book to be read to the jury, the above matters of preliminary proof were essential. Abbott's Trial Evidence, p. 322 *et seq.*, notes, and cases cited; 1 Greenl. Ev. (13th ed.) note 2 to sec. 118.

The rules of evidence authorizing the introduction of

books contemplate books of account, shop books, and books showing a regular course of dealing with other persons. But the book in question was simply a memorandum book, and, as its name imports, was intended, not for the purpose of entering charges and keeping accounts, but for making memoranda, to aid the memory of the owner. The witness did not require, as is evident from his testimony, the aid of the book to refresh his memory; and it is one of the requisites to authorize the admission of such books that it should appear that no better evidence was attainable. 1 Greenl. Ev. (13th ed.) sec. 117.

It is true that one of the grounds upon which such testimony is admissible, as is claimed in this case, is that the entry, being contemporaneous with the fact, is part of the *res gestæ*. But this is only one of the reasons for the introduction of such books. All the other requisites are essential as preliminary to its introduction. In this case only this single requisite is claimed to appear, and it is not of itself sufficient to authorize the admission of the entry. But it is by no means evident, from the testimony, that the entry was ever a part of the *res gestæ*. The appellant testifies that there was no such agreement, and therefore that no such entry was authorized by him. Whether or not, then, it was a part of the *res gestæ*, is a matter of doubt. The necessity which formerly seemed to require the admission of shop and account books does not now exist in so great a degree in relation to minute and bare transactions, as when the party was prohibited from testifying. He may now be a witness for himself, and refresh his memory from his books. It would seem, therefore, that the former rule in relation to book entries should not be relaxed.

To allow such an entry to be given in evidence, under the circumstances of this case, would afford an opportunity for imposture and fraud, which the policy of the law forbids us to encourage. Such a precedent would, we think, be neither safe nor salutary.



The court, therefore, erred in the admission of the evidence, and the error was prejudicial to the appellant.

The judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

DISSENTING OPINION BY WADE, C. J.

I think a memorandum made by one party in the presence of the other, with his knowledge and consent, stating a transaction that has just taken place between the parties in their presence, forms part of the transaction itself, and is competent evidence; and the fact that the other party denies the transaction and the making of the memorandum does not affect the competency of the evidence, but the credibility of the witnesses.

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MANTON, appellant, *v.* TYLER, respondent.

SOLE TRADERS' ACT — *Remedial legislation — Essentials.* — This act of February 4, 1874, of the Montana legislature (see Revised Statutes of 1879, p. 589), is of the nature of remedial legislation, and entitled to a liberal construction. It is as essential that the declaration required by law should state that the married woman intends to do business "on her own account," as "in her own name." The two requirements are not synonymous, but each a distinct essential.

The statute is in the nature of a legislative grant. It confers title when complied with. The omission of these essential words, "on her own account," is fatal to the declaration.

*Appeal from Second District, Deer Lodge County.*

THOS. L. NAPTON, for appellant.

HIRAM KNOWLES, for respondent.

No briefs filed.

WADE, C. J. Plaintiff, a married woman, claims to be the owner of certain cows and other cattle, and brings

this action in her own name to recover the same from the possession of the defendant. To maintain her action she sought to introduce in evidence her declaration as a sole trader, which is in the words and figures following:

“NOTICE TO ALL CONCERNED.

“I, the undersigned, Susan E. Manton, do hereby declare and publish that I intend hereafter to transact business in my own name, in the county of Deer Lodge, Montana territory, as a sole trader, under and by virtue of an act of the legislature of the said territory, approved February 4, 1874. That I intend particularly to engage in buying, selling and raising stock and cattle, also in ranching, and particularly everything pertaining to farming.

“Witness my hand on this 8th day of January, 1879.

“SUSAN E. MANTON.”

Which declaratory statement is properly acknowledged and recorded.

The defendant objected to the introduction of the same in evidence, for the reason that the declaration is insufficient under the statute; which objection was sustained, and this action of the court is assigned as error.

The statute in relation to married women as sole traders provides: “Married women shall have the right to carry on and transact business under their own name and on their own account, by complying with the regulations prescribed in this article.”

“Any married woman residing within this territory, desirous to avail herself of the benefit of this article, shall make her declaration before any person authorized to take acknowledgment of conveyances, that she intends to carry on business in her own name and on her own account, specifically setting forth the nature of the business she intends to carry on and transact, and from that date shall be individually responsible in her own name for all the debts contracted by her by virtue of said busi-

ness, the declaration to be recorded in the office of the county recorder of the county in which said business is to be transacted and carried on."

This statute was designed to relieve married women of certain common law disabilities, and should be construed as a remedial statute. But whether a statute receive a strict or a liberal construction, effect must be given to all its provisions. It is not the province of a liberal construction to disregard or repeal any provisions of a statute, nor of a strict construction, by adhering to the letter, to defeat its general purpose and intention. In either case, effect should be given to the whole statute and every part of it, according to the ordinary meaning of the language used.

Unless a statute is ambiguous or uncertain, there is nothing to construe. If its meaning is plain and certain, it is its own interpreter.

The statute in question is in the nature of a legislative grant. When its provisions are complied with, it confers title. When a married woman complies with its provisions, she is so far relieved of her common law disabilities as to become able to own her separate property; to contract in relation to it; and it is subject to her debts and relieved from the debts of her husband. But in seeking to avail herself of this statute, it is as necessary that her declaration should state that she intends to carry on business on her own account as in her own name. These terms are not synonymous. The one does not presume the other; for she might transact business in her own name and not on her own account, or *vice versa*. The statute requires that her declaration state that she intends to carry on business, not only *in her own name*, but on *her own account*. Both of these terms are material, and each is essential to the validity of her declaration. If one could be disregarded the other might, and the purpose of the statute thus wholly defeated. These are matters of title, and a plain requirement of the statute cannot be dispensed



with. Statutes that confer title or affect property rights must be followed in order to be available.

The sole traders' act provides that the declaration shall state: *First*, that the married woman intends to carry on business in her own name; *second*, on her own account; and *third*, the nature of the business. When made as the statute requires, and properly acknowledged and recorded, she is entitled to carry on business in her own name, and the property, revenue, money, and debts and credits belong exclusively to the married woman, and shall not be liable for her husband's debts; and she is allowed all the privileges and subject to all the processes allowed against debtor and creditor. But in order to become invested with these privileges she must make her declaration as required by the statute.

The declaration in question fails to state that the plaintiff intends to carry on business on her own account, and this defect is fatal to it as a declaration of a sole trader.

Our statute was borrowed from California, and the supreme court of that state has taken a similar view. See *Adams v. Knowlton*, 22 Cal. 283.

The judgment is affirmed, with costs.

*Judgment affirmed.*

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GROPPER ET AL., respondents, v. KING, appellant.

PLACER MINING GROUNDS — *How held — When open.* — The United States law of July 26, 1866, gives to all citizens, and those who have declared their intention to become such, the right to explore and occupy the mineral lands of the United States, subject to the rules and regulations prescribed by law, and the local rules and customs of miners not in conflict with such law. Such local rules and customs become, by adoption, part of the law of the land. And a person, who is competent, having taken up and held such mining ground, and this fact appearing by the pleadings and findings, has acquired inchoate title, and the right to exclusive possession. A grant is presumed. Such ground so held cannot be considered unoccupied public domain subject to the appropriation of any one else.

*Appeal from Second District, Silver Bow County.*

KNOWLES & FORBIS, for appellant.

RANDOLPH & DE WITT, for respondents.

No briefs filed.

WADE, C. J. This is an action to determine the right to the possession of certain placer mining grounds situate in Silver Bow county. The defendant, claiming the ground in question to be unoccupied and unexplored mineral lands of the United States, entered upon and located the same in pursuance of the act of congress of May 10, 1872, and applied for a patent therefor, whereupon the plaintiffs filed their protest and adverse claim, and brought this action under the law to have determined the right of possession to the property.

The cause was tried to the court and the following are the findings of fact:

1st. That the placer mining ground in controversy in this case is situated in Independence Mining District.

2d. That said ground described was taken up and located by plaintiffs and their predecessors in interest in 1869, and that they and their grantors have been in possession of the same and held the same to the present time in accordance with the customs of said district.

3d. That Independence Mining District was duly organized in 1865, and extended from claim No. 75, above discovery, to the forks of Silver Bow creek, and that claims were to consist of one hundred feet up and down said gulch or creek, and from either side of the banks of said creek to the second rise of the bed-rock.

4th. That the rules and customs of said district are still in force and acted upon by the miners therein, and that hill and gulch claims are recognized by the laws and customs of said district.

5th. That all mining claims in controversy and all the ground in dispute in this cause were located or purchased

by one Ferdinand Isle in 1869, and the plaintiffs are his grantees.

6th. That plaintiffs and their grantors had been in the actual and quiet possession of said ground described in plaintiffs' complaint since 1869, and were in the actual possession at the date of the commencement of this action. That said placer claims, including the ground in dispute, were all duly recorded in the records of Independence Mining District.

7th. That defendant's grantors entered upon said ground and applied for a patent therefor without making any discovery or location thereof, and without doing any work thereon, and made no claim or title except by a survey.

There was a judgment in favor of the plaintiffs, from which the defendant appeals.

There is no evidence contained in the record. We are therefore to presume that the testimony supported the findings.

The act of congress of July 26, 1866, granted to citizens of the United States, and to those who have declared their intention to become such, the right to explore and occupy the mineral lands of the public domain, subject to such rules and regulations as may be prescribed by law, and subject also to the local rules and customs of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

There is no claim by appellant that the local rules and customs of Independence Mining District are in conflict with the laws of the United States or the territory. When this is the case such rules and customs become part of the law of the land, and when complied with in taking up and locating mining ground, a grant from the government follows and title vests in the locator.

The possessor of real estate is presumed to be the owner thereof until the contrary appears; and a like pre-



sumption of title arises in favor of the possessor of a mining claim in a mining district. He is presumed to hold the same by virtue of having complied with the law and the local rule and customs. In this case this presumption is supported by a finding of fact, that the plaintiffs and their grantors have held, occupied and possessed the ground in question for more than ten years next prior to the commencement of this action, in pursuance of the law and the local rules and customs of Independence Mining District, in full force and operation during all that time.

It followed, therefore, that when the defendant entered upon the ground in dispute and applied for a patent, such ground was not unoccupied, but, on the contrary, the plaintiffs held, possessed and occupied the same, with the exclusive right to such possession and occupation which presumes a grant, and the government having so far vested the plaintiffs with title, there was no room for a like grant to the defendant.

The judgment is affirmed, with costs.

*Judgment affirmed.*

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McKINSTRY, appellant, v. CLARK & CAMERON, respondents.

**EVIDENCE**—*Certified copies*.—A certified copy of the record of a declaratory statement or deed is made competent evidence, by the statutes of Montana, without producing or accounting for the loss of the original instruments.

**BURDEN OF PROOF**.—In a case where defendants claim by virtue of two locations made from a single discovery hole, where only one could be valid, it was error in the court to charge that a plaintiff in an action of ejectment, claiming the premises by virtue of a relocation, should bear the burden of proving which one of the two locations was invalid.

Right of possession comes only from a valid location.

Only so much of the evidence need be stated in the abstract as may be necessary to explain an objection.

EXCEPTIONS.—Exception taken in writing at the proper time to each of the instructions given at the instance of one of the parties to an action, so far as the same were separately numbered and marked by the judge, was sufficient compliance with the law, and not within the objection declared in *Griswold v. Boley*, 1 Mont. 549, and *McKinney v. Powers*, 2 Mont. 466.

*Appeal from Second District, Deer Lodge County.*

HIRAM KNOWLES, for plaintiff and appellant.

The court erred in allowing defendants to introduce in evidence the certified copy of the statement of location of the Sankie lode without proof of the loss of the original statement of location. It also erred in allowing the introduction in evidence of the certified copy of the deed from Ford to Cameron without proof of the loss of the original.

The rule as to the introduction of parol evidence of the contents of an instrument, or a certified copy of an instrument, or of the record thereof, is generally that this proof of the loss of the original must first be given. Greenl. on Ev. secs. 84, 557, 558, and note 6 to sec. 84.

It is specially provided in our statutes (see Laws of 1879, p. 442, sec. 206), that a certified copy of a deed can be introduced in evidence only when the proof of the loss of the original is first made. Special statutes upon a subject control over a general statute which might embrace it. Sedg. on Stat. & Const. Law, 36a, note a.

In California, when the statutes of that state were similar to those of Montana, the courts of that state held that there should be proof of the loss of an instrument before a certified copy could be introduced in evidence. *Touchard v. Keys*, 21 Cal. 210, 211; *Garwood v. Hastings*, 38 Cal. 219.

The court erred in giving instructions Nos. 4, 5, 7 and 8. These instructions were not based upon any evidence in the case. There is nothing in the evidence to show which one of these claims, called the Sankie, Dr. Ford

located first. There is nothing in the evidence to show that either one of the Sankies was located first. As far as the evidence goes, it shows that the location of the Sankie west of discovery was located first. The Sankie west from discovery was recorded first. See location notices, Transcript, pp. 29-45. There is no evidence in the case that tends to show that Dr. Ford ever made more than one discovery on the Sankie vein. Both notices speak of the location commencing at discovery shaft. See Transcript, pp. 29-45. As far as the evidence tends to show any discovery it is confined to one shaft.

Where instructions are not based on some evidence in the case they should be refused. *Trustees of Iowa College v. Hill*, 12 Iowa, 462; *Shaw v. Brown*, 13 Iowa, 508; *State of Iowa v. Gibbons*, 10 Iowa, 508; *People v. Roberts*, 6 Cal. 214; *Tompkins v. Mahoney*, 32 Cal. 282; *People v. Hurley*, 8 Cal. 390; *People v. Sanchez*, 34 Cal. 17. And to give such instructions is error which will reverse a judgment. *Mendelshon v. Anaheim, Lighter & Co.* 40 Cal. 657; *United States v. Gotlieb Batling*, 20 How. (U. S.) 252; 2 Miller (U. S.), 383; *Michigan Bank v. Eldred*, 9 Wall. 553-4; *Alger v. Gardner et al.* 54 N. Y. 360.

Again. Instructions should correspond to the issues presented by the pleadings. There was no issue of forfeiture in the case. The above instructions instruct the jury upon representation. This only comes in question when an issue of forfeiture is made. There was no such issue in this case. *Lexington Ins. Co. v. Taver*, 16 Ohio, 324; *Fairbanks v. Woodhouse*, 6 Cal. 434; *Nolen v. Wisner & Van Nash*, 11 Iowa, 190; *Conlin v. S. F. & S. J. R. Co.* 36 Cal. 404.

The court erred in giving instructions Nos. 2 and 7 asked by plaintiff. They were not supported by the evidence. There was no evidence to show that Ford ever staked that ground before he recorded his location notice or statement. The court held that he should have done this. There was nothing to show that Ford ever made



a valid location of that claim as required by law. There is no evidence that shows that Ford ever did stake that ground.

The court erred in giving the third instruction asked by defendants. This instruction is to the effect that if there is no evidence that this ground was public domain at the time plaintiff made his location, then the jury must find for defendants. This would require the defendants to prove that the ground had never been located by any one prior to the time when plaintiff located it, or if so, it had been forfeited. They are instructed that they must find affirmatively that it was subject to location. This rule would require a plaintiff in ejectment for a mining claim to allege that the ground he located was public domain when he located the same. Now, when a man locates a mining claim, he must be considered a purchaser of the same as much as if he obtains a deed therefor. He does not take by devise. Now, in actions for ejectment, ordinarily, the plaintiff does not need to prove that his grantor never before conveyed away the estate he claims. If he has, it devolves upon the defendants to show it. See Instructions of Juries, Sackett, 116.

The plea is urged that ground must be unoccupied public domain before a location could legally be made. A person who receives a deed to a piece of land from one who has parted with his title to the same receives a void conveyance. He gets nothing by it. Yet it has never been held that a plaintiff in ejectment must prove that his grantor never conveyed to any one else the ground embraced in his deed. Such a fact is never alleged and never proved. In this the jury were instructed that they must find affirmatively that this ground had never been located by any one, or if so, it had been forfeited, before they could find for plaintiff. There was no evidence and no issue in the case to warrant the instruction.

It is an established rule in practice, that when the plaintiff shows *prima facie* a title, the defendant can de-

feat this by showing title in himself. Here, however, the jury were instructed that they must find that no one had any title before plaintiff's location.

The court erred in giving the sixth instruction asked by defendants. There was no evidence that the claim in dispute was a relocation. It is true, one of the witnesses uses that term, but there are no facts to support the assertion. The case was tried upon the theory that if the claim ever in fact had been legally located by Dr. Ford, that ended the case. Here again we are called upon to disprove defendants' title before the same was established by them; plaintiff is called upon to prove which one of the Sankie claims was located last. It had been shown that Dr. Ford claimed two claims, one east and the other west from the same discovery shaft. Which was located first, if either, was peculiarly within his knowledge. He probably was the only one who knew if the locations were ever made. The defendants claim through him.

The general rule is, that facts peculiarly within the knowledge of a party he ought to prove. 1 Greenl. on Ev. sec. 79; *Dupont v. Dunning*, 6 Iowa, 172.

If the rule announced by the court in this case is correct, then the door is effectually shut as to the attacking of double or treble locations on the same vein.

The defendants are presumed to know the sources of their own title.

The instruction contained the clause, "if defendants were in possession of said Sankie claim." Now, what difference this made I do not see. If the defendants were only in possession, then if the plaintiff made a valid location of the ground they would have the best right. Possession will not prevail against the title. One who is in possession of mining ground without locating the same according to law is a trespasser. A locator, according to law, is a purchaser and has a grant from the general government. This whole instruction has the effect of holding that it is not necessary for the defendant to

prove that he had a valid location after defendant had proved one and let the best title prevail; but that the plaintiff must disprove defendant's title; must prove he had none, before he could recover.

In several of the instructions the court uses this language: "Valid location." "In the manner required by law." And yet the court nowhere tells the jury what is a valid location, or when a location is made according to law. The jury were left to determine these matters for themselves. That is, they were required to determine what the law was as well as the facts.

In the case of *The People v. Thomas Bynes*, 30 Cal. 207, it was held that if a court had not given the definition of *unlawful* in a trial for murder, it would have been error.

Taking the fourth, fifth and sixth instructions given by the court at the request of defendant, and you find it lays down the rule that defendant's grantor could locate one valid claim on the Sankie; that the one he first located was the valid one, and that it devolves upon plaintiff to prove which was invalid.

Now there are several acts constituting the location of a mining claim: First, the discovery of a vein of mineral-bearing ore; then the claiming the same; then the marking out the boundaries of the claim so that they can be readily traced; then the making out a declaratory statement under oath, and making the same a record, in which the claim shall be so described, by reference to some natural object or permanent monument, as will readily identify the same. If the locator stops short on any of these, he has not located his claim. In one of the instructions asked by plaintiffs and given (see page 00 of transcript), the court lays down the rule that the claim to which he first perfected his title must be the one he can hold, if either.

Now in this case we know the one to which he first perfected his title. The location of the claim in dispute



in this case was not the one to which he first perfected his title, but the other location going west from discovery. Ordinarily, I suppose, the record will go back to the first act of location. In this case it is difficult to tell which acts pertained to the location east, and which to the west. There was but one discovery hole, but one notice. The stakes on the line between the two locations pertained to both locations, if any were ever placed there by Dr. Ford. It would seem, then, that the best rule in this case would be that he should have title to the one to which he first perfected title.

The rule established by the instructions above named, as fourth, fifth and sixth, is different. When instructions conflict, and two rules are laid down, upon either of which a verdict could be founded, this is error which will reverse a judgment. *People v. Campbell*, 30 Cal. 312; *People v. Anderson*, 44 Cal. 65; *Brown v. McAllister*, 38 Cal. 573; *Chester v. Con. P. Ditch Co.*, 53 Cal. 56.

I come now to the materiality of these errors, wherein the jury was instructed that, if the defendant made two discoveries on the same vein, he had a right to make two locations on that vein.

First. As I have said, there is no evidence to support this instruction; and second, it is not law. If the evidence shows that there was but one discovery, as I think it does, then it becomes material to inquire whether or not a party can make two locations from the same discovery hole on the same lode, although said locations are made only from the center of said discovery. In fact, I think when it is patent that both discoveries are on the same lode, one person is entitled to locate but one claim. The law of congress is silent upon this point. The mining law of 1872, it is evident, did not provide how many claims one man could locate. See R. S. of U. S. sec. 2320. This was left to the local rules and customs. See R. S. of U. S. sec. 2324.

Miners are left to make rules in regard to the location of

mines. Under the mining law of 1872, a person was still allowed to occupy and explore and possess mining ground under local customs, rules and laws, as before. The provision of the act of congress of 1872, which, it is claimed, provides for the number of feet a person can locate, is as follows: "A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal but shall not exceed one thousand five hundred feet in length." Eliminate the words, "whether located by one or more persons," and we have: "A mining claim located after the 10th day of May, 1872, may equal but shall not exceed one thousand five hundred feet in length." This is certainly a limitation of a mining claim. It provides how long a mining claim may be. The clause above eliminated, when added to it, certainly does not make it anything else. With these added, it only provides that a mining claim, whether located by one or more persons, may equal but shall not exceed more than one thousand five hundred feet. This cannot be tortured into a grant to a person to locate any number of feet. It only defines the extent of a mining claim. It does not say one person may locate one or more than one of these claims, or that any number of persons can locate one or more of these claims. With a very little trouble I think we can see how congress came to enact this clause. The manner of locating mining claims that usually prevailed in Nevada and California was what is usually called joint locations, and the notice of location usually commenced, "We, the undersigned, locate — feet on this lode," or, "We, the undersigned, claim — claims on this lode, of two hundred feet each," etc.

The number of feet thus located, whether the same was one hundred feet or three thousand feet, was termed a mining claim. The mining act of 1866 (see Brightly's Dig. of U. S. Laws, vol. 2, p. 400, sec. 77) evidently refers to this mode of location, when it provides "That no person may make more than one location on the same

lode, and not more than three thousand feet shall be taken in any one claim by any association of persons."

From the mining work entitled "Leading Cases on Mines, Minerals and Mining Water Rights," by Blanchard, p. 118, we find that under this act of congress of 1866 the custom grew up for one person to use the names of some fourteen of his friends in locating the same in this manner, locating three thousand feet on a vein, with the understanding that these friends were to deed to him the amounts thus located in their names; and thus the locator became the owner of three thousand feet instead of four hundred feet as provided by the local laws. The act of congress, then, was intended to curtail the amount of a lode any one man could monopolize instead of being a grant of a monopoly. The clause provides that, before any location is made of a mining claim, a vein must be discovered in the ground sought to be located. This is a condition precedent to the making of a location, but it is not provided that whoever discovers a mineral-bearing vein upon the public domain can locate a claim. There are no laws in Montana that provide whether or not a person can locate one or more claims on the same mineral-bearing vein. There were none when this claim was located. The law that provided the number of feet a person could locate was repealed by act of legislative assembly of May 8, 1873. See Laws of Mont. 1873, p. 83. The law of 1876 did not provide for the number of claims a person could locate on the same vein. There were no written customs or rules in Summit Valley Mining District as to the number of claims one person could locate upon the same mineral-bearing vein. If any custom existed there upon this point, it was an unwritten one. None of any character was shown in this case. If there was a custom upon this subject it must be reasonable. *King v. Edwards*, 1 Mont. 235; *Harvey v. Ryan*, 42 Cal. 628; Blanchard & Weeks' Leading Cases on Mines, pp. 98, 99; Cooley's Blackstone, book 1, p. 77. Would



it be a reasonable custom to allow a man to locate any number of claims on the same vein?

By the congressional law of 1872, claims were limited to two hundred feet, and none but a discoverer could locate more than one claim. He could locate two. This was also the law of this territory up to 1873. See Laws of Mont. 1864, p. 327. This was the general rule adopted by miners in the western mining districts. See Leading Cases on Mines, etc., by Blanchard, pp. 116-118. In the mining act of congress of 1866. See Brightly Digest, vol. 2, p. 400.

A custom that allows more than one claim of fifteen hundred feet on the same vein, considering the former rules, laws and customs, ought to be considered unreasonable. The same rule ought to prevail under such circumstances—that is, where there is no rule or custom, or where the custom is unreasonable—as prevailed when a person located a claim outside of any mining district, or where there was no local law. In such cases his location should be reasonable, and not savor of monopoly. *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 211.

Now, considering what has been said as to the amount any one could locate before 1875, the time of this location, and there can be no doubt but that the power to locate any number of claims on the same lead does savor of monopoly. Under such a rule a person could locate a lode like the Comstock, or all the mines in a district like Leadville.

The acting land commissioner in 1873 decided that there was no law of congress which forbade a man to locate more than one claim on the same lode; and hence he could locate as many claims as he pleased on the same lode, unless he was prohibited by the local law. This, I believe, has been followed by subsequent land commissioners.

The first position was correct. The last does not follow, however. If congress has not prescribed how many

claims a man may locate, or has not legislated upon the subject at all, it does not follow that one person can locate as many claims on the same vein as he pleases. At the time of the mineral act of 1872, everywhere in the western mining region there was a limitation upon the number of claims any one man could locate. When the miners made rules for their district they limited it. Where locations were by legislative enactments, they limited them. See authorities before cited. The legislation of congress, then, should be considered as enacted with these rules and legislative enactments in view. If congress has said nothing upon this subject of how many claims a man can locate, then nothing can be inferred from this. In grants by the public nothing passes by implication. If a grant is silent about a power it does not exist. *The Case of Binghamton Bridge*, 3 Wall. 75; *Mills v. St. Clair Co.* 8 How. (U. S.) 581; *Rice v. T. Min. & N. W. R. R.* 1 Black, 383; Sedgwick on Stat. & Con. Law, 291, 387-9.

The locator of mines must occupy them in accordance with the local rules, customs and laws. See R. S. U. S. The miners have the right to make rules and customs as to the location and forfeiture of mining claims. R. S. U. S. sec. 2324.

From these provisions of the congressional mineral act of 1872, it is evident that it was the intention of congress to turn this subject, of how many claims a person can locate, over to the local authorities, whether the same were the rules and customs of the mining district or the local legislature. In this case these were silent. No provision on the subject was made.

We are left, then, to the general custom that prevailed throughout the western mining regions, that a person could locate where there was no rule as to the amount he could take, but his location must not savor of monopoly. And in considering what would be classed as monopoly, the general rules and customs existing throughout the

country could be considered. See *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 211. This was everywhere two hundred feet, unless a person was a discoverer, and then four hundred, or two claims of two hundred feet.

In regard to agricultural lands, the congress of the United States has guarded against monopoly. If it has not done so in regard to mines, it is because it was supposed that the same class of legislation that had before prevailed in the mining regions of the west would be continued. It is now left to the courts to say whether they will sanction locations that in principle amount to monopolies. The question in my opinion is before the courts, and it is for them to say.

In this case the location was made from one discovery hole or shaft. Both locations were called the Sankie. Now if Ford could not locate two claims from the same discovery hole on the same lode, I do not see how in principle he can go ten or a hundred feet away from that discovery and make another location on the same lode. Is not this as much of a monopoly as the former location? Both locations are the same in principle.

THOS. L. NAPTON, for respondents.

I shall attempt to reply to the points made by the attorney for appellant in the order in which he has presented them to this court.

1. The declaratory statement of the Sankie East lode claim is objected to because the original was not introduced, but a certified copy, no proof of the loss of the original having been made. Sec. 394, p. 490, Revised Statutes of Montana, 1879, says such certified copies shall be *prima facie* evidence in *all* cases. The certified copy of the declaratory statement is certainly admissible under the section cited above; and section 206, p. 442, of statute of 1879, refers to conveyances of realty only, and not to such declaratory statement, and is a law as general in regard to conveyances of realty as the section herein first



referred to. Besides, this section is a special law, saying what shall be *prima facie* evidence; and the two statutes, being *pari materia*, should be so construed as to give effect to both. See *Thomas v. Smith*, 1 Mont. 1.

The deed from Ford to Cameron (although I think admissible as a certified copy) cannot be a ground for reversal of this case, for the reason that even the original deed, or a certified copy, could not affect the judgment. One co-tenant can defend for all his other co-tenants; so in this case Clark, defendant, could defeat the suit of plaintiff, whether Ford or Cameron had the legal title. See Freeman on Co-tenancy and Partition, p. —, and other authorities there cited.

The California authorities cited by appellant's counsel are in no manner applicable to the admissibility of the certified copy of the declaratory statement of defendants' grantor. The defendants were in actual possession when this action was commenced, and the copy would be admissible to show the extent of their claim, the record thereof, and date of record; and as we cannot review the testimony or the sufficiency thereof in a statement on appeal, this court cannot reverse the case. This objection, if it could be reviewed at all, could only be on motion for a new trial, and we cannot tell but that the original was afterward introduced, because this statement on appeal does not *purport* to contain *all* the evidence in the case upon any one given point.

The second error relied upon by appellants is to instructions four, five, seven and eight. This objection and assignment of error seems to be general, and an appellate court will not consider the same, for the reason that counsel for appellants did not cite or call the attention of the court below to any particular error in either of said instructions. See *Griswold v. Bolley*, 1 Mont. 549; *McKinney v. Powers*, 2 Mont. 466; 7 Wall. (U. S.) 39; *Johnston v. Jones*, 1 Black, 209; *Rogers v. Marshal*, 1 Wall. 645-654; *Harvey v. Tyler*, 2 Wall. 328; Thomp-

son on Charging a Jury, p. 158, sec. 117; *Spring Co. v. Edgar*, 99 U. S. 658, 659.

The *nisi prius* court, then, had no opportunity to correct the error if there was any.

This is an action of ejectment, and the plaintiff must recover, if at all, upon the strength of his own title, and he admits in his pleadings and affirmatively alleges that defendants were in actual possession of the ground in controversy at the date of the commencement of this action. The burden of proving a valid title as against one in the actual possession rests upon the plaintiff; and if any one had to defeat the location of Dr. Ford by proving he had made a double location from the same discovery, it was the plaintiff. The plaintiff first proves his location. The defendants then proved a prior location by their grantor, Dr. Ford; then it would devolve upon plaintiff, in rebuttal, to show that Ford's location was void by reason of making two from the same discovery hole, and to show which one was first. This matter may have been peculiarly within the knowledge of Dr. Ford, but he is dead, and the plaintiff had the same chance at his testimony that defendants had; and besides this, every presumption would be that he had located in accordance with law. If this double location was peculiarly within the knowledge of defendants, plaintiff could have made witnesses of these defendants in his own behalf.

2d. These instructions cannot be reversed on account of there being no testimony to support them, for the reason that the attorneys do not state nor agree that *what* testimony was included in the statement on appeal was *all* the testimony in the case applicable to the instructions excepted to; and further, there is testimony showing actual work and representation without objection on the part of counsel for plaintiff. See testimony of Thompson, Venor and Boardman, pp. 15, 17 and 19 of transcript.

3d. Again, this evidence and these instructions are correct for the reason that the testimony shows the good faith of defendants, and that they nor their grantors have ever *abandoned* the ground in dispute, and an *abandonment*, as distinguished from a *forfeiture*, can be proved under the general issue, as presented by the proceedings in this case, and the instructions are applicable to the testimony regardless of any question of forfeiture.

Again, these instructions must all be taken in connection with those given at request of plaintiff; and in plaintiff's instructions one, two and three, the court defines what is the valid location of a mining claim and what an invalid one is; and further (see fourth instruction), that two contiguous claims of one thousand five hundred feet each cannot be located from or discovered in the same hole. The jury must have found either that plaintiff had not complied with the law and had no title, or, on the other hand, that Dr. Ford had not taken one hole as the basis of his contiguous claims of one thousand five hundred feet each. The instruction certainly gives the plaintiff every technical legal right he may have had, and as we cannot review the insufficiency of the evidence except on a motion for a new trial, we see no application of the argument of counsel for appellant. Counsel continuously supports his argument by saying "there was no evidence" of such and such facts. How does this court know there was not?

Further, after instructing the jury as to the law governing the acquisition of title to a quartz claim at the request of counsel for appellant, what would be the necessity of repeating the same at the request of defendants or of his own motion? All these instructions, in contemplation of law, come from the court as a whole, and must be so considered by the appellate court.

Further, instruction 2, p. 75 of transcript, is correct, and is supported by what little testimony is brought up; and we cannot say that Dr. Ford did not make a location



in 1875, for that would be discussing the insufficiency of the evidence.

Further, as to instruction 3, p. 75 of transcript, counsel for appellants seems to place a wrong construction upon it. This instruction is drawn in connection with the testimony of Thompson, Venor and Boardman, and only told the jury that it must be unoccupied mineral land of the United States before the plaintiff could initiate a title or receive a grant. See *Atherton v. Fowler*, 96 U. S. 513; *Belk v. Meagher et al.* (No. 69) U. S. Court, October, 1881.

The foregoing authorities not only decide this point, but the latter, I think, goes further, and compels a party, when he makes a relocation, to allege and prove the ground was open to a grant from the government. It is evident that it was a relocation by plaintiff, because the ground was in the actual possession of defendants, with one shaft fifty-five feet deep, and others of lesser depth, and plaintiff made his discovery by looking down one of these shafts, and while defendants were at work.

The counsel for plaintiff seems to have waived in argument any objection to the *affidavit* to defendants' declaratory statement; plaintiff's is the same as defendants.

Title to a quartz claim is *perfected* when a discovery is made and ground staked. This is a perfect title for twenty days; then he records his declaratory statement, and it is a perfect title for a year, and then is perfect for another year, and so on *ad infinitum*, if he represents according to law, or until he procures a patent.

From the tenth page of brief of counsel for appellant to its close, I might confess it all; he has only argued in favor of an instruction given by the *nisi prius* court at the request of counsel for appellant. What is the use of detailing a lot of personal experience and personal knowledge to show that the legislation of congress was supposed to be against monopoly, when the court gave for appellant the following instruction, and to which defend-

ants did not object. The instruction is as follows (see p. 71 of transcript): "No person can locate two contiguous claims of fifteen hundred feet each on the same lode, when they are located on from the same discovery shaft or hole."

Does this instruction savor of monopoly? And why should the counsel for appellant take eight pages of his brief to prove that the instruction given by the court at his request was good law, and to which defendants' attorney did not object, and have had no reason to appeal from by reason of any objection or exception? Rules and customs of mining districts are never taken judicial notice of, but must be proved on the trial in order to acquire a right by virtue of their existence. There are none offered in evidence or proved in this case, as appears from the statement on appeal; and certainly an appellate court will not take the *dicta* and varied experience of counsel for appellant as a substitute for the testimony that *might* have been introduced.

Admitting all this for the purpose of argument, I contend that the legislation of congress has been in reference to mines particularly, and all other subjects since 1865, in favor of monopolies.

Placer mines, according to counsel for appellant, were from one to two hundred feet up and down a gulch, and extended from rim rock to rim rock on either side. On July 9, 1870, an act was passed and approved granting to a placer miner one hundred and sixty acres of land as a placer mine in a gulch or elsewhere, if he took it up in ten-acre lots. See sec. 12, ch. 225, R. S. U. S.

Does this savor of monopoly? Or does it show that there has been a change from the rules of minors in favor of monopolies? Again, in reference to quartz claims. In ch. 262, sec. 4, of the Revised Statutes of the United States, enacted in 1866, congress limited, in *express* words, the location by one party of a quartz lode to two hundred feet, except in case the party was the discoverer, and

then to four hundred feet. In 1872 the act under which this claim was located by plaintiff and defendants, the absolute right to one thousand five hundred feet is granted upon compliance with the law, and there is no prohibition from making more than one location on the same lode, or from making two locations from the same discovery. The law says, in substance, that a party discovering a lead may locate in *one* location a parallelogram of land one thousand five hundred feet in length, and six hundred feet in width. But the law nowhere prohibits a second location, but, on the contrary, leaves section 1 of said act open to the energy and industry of the discoverer, and allows him to locate upon the same lode another one thousand five hundred feet by six hundred (or on any other lead), for the reason that it is thrown open to free exploration and possession, and is unoccupied mineral land of the United States. To prohibit a man from making a second location on the same lead, by the same rule he should be prohibited from discovering another lead and making a location on it. According to the argument of counsel for appellant, this would be a monopoly. Congress certainly intended by the act of 1872, in reference to mines, to reward industry and knowledge beyond what was given in the act of 1866, or they would have inserted some restriction or limitation on the ability or perseverance of the miner. Why prohibit the man who makes the discovery, and give the loafer the benefit of his discovery? Let the discoverer take the lead so far as he can find it, would be the policy to reward true enterprise, and not save his intelligence and industry to be frittered away to scattered stragglers behind, and reward them for something they had never done. The rule is different in reference to homesteads and pre-emptions from what it should be as regards mines. Mines fail. Homesteads and pre-emptions do not, in any portion of this country.

In conclusion I would say that every instruction given



was all that plaintiff could possibly ask, and those for the defendants do not conflict with them. The jury must have found, by this general verdict, that plaintiff made no location, or, if he did, that defendants' grantor, Dr. Ford, had made a *prior* valid location, and defendants could hold the ground according to the familiar maxim, "*Qui prior est tempore, potior est jure.*"

#### REPLY OF APPELLANT.

The same statute existed in California as to certified copies of records as the one cited by respondents, when the decisions cited in appellant's brief were made. See Woods' Digest, p. 000. The decisions cited in appellant's brief were made when that statute existed.

The judgment in this court was in favor of Cameron and Clark. If Cameron had no title, then there is error in the judgment, even if Clark could defend the action in his own right for his interest. Cameron had no right to a judgment against McKinstry when he failed to show title.

The authorities cited from California were applicable. They were made under a statute the same as that cited by respondents. See Woods' Digest, p. 000.

The testimony set out in this case does purport to be all the evidence in the case material to the points raised. In fact, it purports to be the evidence in the case. It would present a curious state of a case if a party who has agreed to a statement could have the mental reservation that this is all as far as it goes. This must be taken as the evidence in the case—all of it. It was not necessary under the Practice Act to call attention to the particular error in each instruction. The exceptions were sufficient. *McCreery v. Everding*, 44 Cal. 246; *Shea v. P. B. V. R. R. Co.* id. 414.

The cases cited from Montana decisions are not in point. Those cited from United States decisions depend

upon a rule of the supreme court of the United States. See Charging Jury, by Thompson, p. 157, sec. 116.

As far as the evidence went as to location of defendants, it showed that Dr. Ford did not locate according to law. See evidence of Parks and of Porter, pages 00, 00 of transcript. There was no evidence to show that Ford ever did locate the ground according to law. If the possession of mining ground raises the presumption that it was located according to law, all that one party in a mining suit has to do is to show his possession, and then the contesting party must show not only that he located according to law, but that his opponent did not. The burden of proof is on him not only to prove his own title, but to prove that his opponent never had any, also, before his opponent can be called upon to show any title or location.

Again. I must call the attention of the court to the fact that the evidence in the record does purport to be the evidence in the case, and not a portion of it. Respondents were allowed to show actual work on this ground, in order that they might show possession of the same. But nowhere were they allowed to show representation. If so, it was immaterial evidence, and should not have been the basis of instructions. There was no such issue in the case, and instructions should be confined to the issues. See Proffat on Jury Trials, sec. 313, wherein he says this is a leading, cardinal rule.

Again. There is nothing to show that plaintiffs ever claimed that they did or did not abandon the ground. There was no issue of this kind.

• There are no instructions that in terms, as given for plaintiff, define what was a legal location or a valid location. If the fact that there is a shaft on a piece of ground shows that the location of the same is a relocation, then we have arrived at a peculiar era of legal presumptions.

Title to a quartz claim is not made until a declaratory

statement is recorded and in it the ground is identified as provided by law. The acts constituting location have not until then been complied with.

Counsel for plaintiff, by inadvertence, in his opening brief, did not claim affidavit to declaratory statement of Ford was defective. If the court is going to hold that such affidavits render a statement defective, he would like the benefit of the same for his client. The affidavit is not as required by law, although the form in which it was made may have been a common error.

It is not true that in placer claims the law favors monopoly. In an organized mining district no one can hold more than the local laws allow. Whether a man can locate ten acres outside of a mining district has not yet been tested by the decisions.

CONGER, J. This is an action of ejectment brought to recover the possession of a certain mining claim, described as the Themis lode claim, the same being a quartz mining claim fifteen hundred feet in length by six hundred feet in width along said lode, situate in Summit Valley Mining District, Deer Lodge county, Montana territory, and also for damages in the sum of \$100 and costs.

Plaintiff avers that on the 2d day of March, 1880, he was the owner of and entitled to the possession of said lode, and that afterwards, to wit, on or about the 3d day of March, 1880, and while plaintiff was so seized and possessed and entitled to the possession, the defendants entered upon the same and did oust the plaintiff from possession, and maintain and hold the same. He therefore asks judgment for possession and his damages and costs in the case.

Defendants, in answer, deny the allegations in plaintiff's complaint, and for further answer allege: that since the 27th day of April, 1875, they and their predecessors in interest are and have been the owners of and in the possession of all the premises described and claimed by



the plaintiff, said premises being claimed and possessed as the Sankie lode claim.

In reply plaintiff denies that defendants, or either of them, are now or have been the owners of said premises under the name of the Sankie lode claim since April 27, 1875, or otherwise, and deny that they are or have been entitled to the possession of the premises.

Upon the trial of the cause, the jury found in their verdict for the defendants, upon which verdict the court ordered judgment for the defendants with costs.

From which judgment of the court below plaintiff appeals to this court and assigns the following errors of law:

*First.* The court erred in admitting certified copy of the declaratory statement of location of Sankie lode, as is specified in plaintiff's bill of exceptions No. 1.

*Second.* Admitting certified copy of deed from Ford to Cameron as specified in bill No. 2.

*Third.* Error in giving instructions as specified in plaintiff's bill No. 3.

As to the first error assigned, viz., admitting in evidence a certified copy of declaratory statement of location of Sankie lode, without proof of the loss of the original, section 873, chapter 45, article 1, provides that any person hereafter discovering any mining claim, etc., shall within twenty days thereafter make and file for record in the office of the recorder of the county in which said discovery is made a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States.

The law requires the discoverer to make and file, in the office of the recorder, his declaratory statement to be by him recorded; and section 384, article 4, fifth division of the general laws, is as follows, to wit: "Copies of all papers filed in the office of the recorder of deeds, and transcripts from the books of record kept therein, certi-

fied by him under the seal of his office, shall be *prima facie* evidence in all cases:"

And section 609, Civil Code: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases. . . . Paragraph 4. When the original has been recorded and a certified copy is made evidence by this code or *other statute*." And in further explanation, the second clause of the fifth subdivision provides that, in the cases mentioned in subdivisions 3 and 4, a copy of the original or a certified copy must be produced.

Taking all these statutes together, the correct conclusion is, that either the one or the other is competent evidence to offer. And it was not error in the court below to admit the certified copy of location notice in evidence without first accounting for the absence of the original.

The foregoing is also conclusive as to the second specification of error.

The third assignment of error specified and relied on by the plaintiff is contained in bill of exceptions marked No. 3, and are exceptions to the following instructions offered by the defendants and given by the court, and numbered 1, 2 and 3.

Upon examination of the transcript it appears that nine instructions were given by the court and indorsed as defendants' instructions, but they are not numbered, except that as to the second there is a figure 2, and at the beginning of the third there is a figure 3. No numbering appears on the others.

There then appears in the transcript ten other instructions, marked given, and indorsed as plaintiff's instructions, but they are not numbered.

The law requires in the sixth subdivision of section 253, Code of Civil Procedure, that. "When the argument of the case is concluded, the court shall give such instructions to the jury as may be necessary, which in-

structions shall be in writing and be numbered and signed by the judge."

But this deficiency is not assigned as error and seems to have been no injury to the appellant, who has recited in his bill of exceptions the particular instructions to which he at the time excepted. It is not, therefore, within the province of this court to consider in this cause this irregularity of the transcript.

The court instructed the jury: "The defendants in this cause have denied all the material allegations in plaintiff's complaint, and this puts upon him, the plaintiff, the burden of proving every material allegation in his complaint, before he can recover; and if the jury do not find from the evidence in the cause, and by a preponderance thereof, that the plaintiff made a discovery of a vein of quartz, and staked it and recorded it as required by law, then you should find your verdict for the defendants." To which plaintiff excepted.

"2. If you find that Ford located this ground in the manner required by law in 1875, and that it has been represented ever since, you must find for the defendants." To which plaintiff excepted.

"3. The jury must find that the ground plaintiff located was subject to location at the time he entered upon and located the same, or the verdict must be for the defendants." To which plaintiff excepted.

"If you find that Ford discovered a ledge on the ground in controversy and made two distinct locations, you are instructed that he had a right to make one location, and that the first location, if regularly and lawfully made, was good and valid, notwithstanding he may, immediately after making the first, have attempted to make the second. If, therefore, you find that one valid location was made, and that he and his successors, through whom defendants claim, have represented the same ever since, by doing the requisite amount of work thereon, such claim was not subject to relocation by plaintiffs,



provided you find that the ground in question was within that one of the two located which was validly located and represented by the defendants, and which was the one of the two they were entitled to hold." To the giving of each one of the two foregoing instructions plaintiff excepted.

"If plaintiff recovers it must be on the strength of his own title; and if one of the Sankie claims was not subject to relocation at the time plaintiff's location was made, the burden of proof was on the plaintiff to show which of the two Sankie locations was invalid, and what part of said ground was subject to relocation, if defendants were in possession of the said Sankie claims." To the giving of which plaintiff excepted.

From an examination of the foregoing instructions and the evidence contained in the transcript, it is apparent that the trial proceeded and the court instructed the jury upon the basis that defendants had located two claims, called Sankie East and Sankie West, from the same discovery. And the court instructed the jury, that: "Although two locations cannot be made from one single discovery, yet if Anson Ford discovered the vein in two distinct places, he had a right to make a location for each of such discoveries."

It will be seen that by one of the instructions the jury were told that, if plaintiff recovers, it must be on the strength of his own title. So far, this is the law. But when they were told that if one of the Sankie claims was not subject to relocation at the time plaintiff's location was made, the burden of proof is on the plaintiff to show which of the two Sankie locations was invalid, and what part of said ground was subject to relocation, it is evident a burden was laid on the plaintiff, which, by no construction of law or reasoning of logic, he was called on to bear.

But it is contended that this error is cured by the rest of the instruction, viz.: "If defendants were in posses-

sion of said Sankie claims," and the following instruction, defining possession, which is as follows: "By possession of a mining claim, actual personal presence on the ground is not meant. But if a party has discovered a ledge with a well defined wall rock within the limits of such claim, has posted and recorded his notice as required by law, marked its boundaries by placing sufficient stakes at the corners of his claim, so that such claim can be readily identified thereby, and then performed the amount of work thereon required by-law to hold the same, these acts constitute possession of the claim."

This instruction is correct as to possession, but it goes far beyond that; and if defendants had performed the requirements of the instruction, they were not only in possession, but had the right to possession.

But the mere stating of a correct legal proposition to a jury does by no means shift the burden of proving the facts necessary to form the basis of the instruction given.

Counsel for respondents (defendants heretofore) contends: "That this is an action of ejectment, and the plaintiff must recover, if at all, upon the strength of his own title, and he (plaintiff) admits in his pleadings, and affirmatively alleges, that defendants were in actual possession of the ground at the date of the commencement of this action."

The supreme court of the United States, in the case of *Belk v. Meagher et al.*, say: "The right to the possession comes only from a valid location; consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

Again, counsel argue that plaintiff first proved his location. The defendants then proved a prior location by their grantor, Dr. Ford. Then it would devolve upon plaintiff, in rebuttal, to show that Ford's location was

void by reason of making two from the same discovery hole, and to show which one was first.

This reasoning is in accord with the instructions above, and they were undoubtedly given on the same view of the law.

When the plaintiff has proved his location, and the defendants have proved a prior valid location, that is doubtless sufficient to defeat plaintiff's right; but that is not the case. Defendants claim two locations, one of which, it is assumed, may be invalid, and the jury were told the burden of proof was on the plaintiff to show which of the two was invalid, or, as counsel for respondents says in his brief, "to show which was first."

A simple analysis and statement is sufficient to show the error of law. These instructions would mislead the jury; for when they were told the burden of proving which of the two Sankie claims was invalid, if defendants were in possession as before stated, they would naturally be led to the conclusion that the defendants had performed their entire duty, if the plaintiff did not, by a preponderance of the evidence, prove to the contrary.

It is said these instructions cannot be reversed on account of there being no testimony to support them; that all the testimony in the case applicable to the instructions is not stated.

Section 282 of the Civil Code is as follows: "The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more." This has been done in this case.

It is true, as alleged by counsel, that the instructions must all be taken in connection, one with another. They are not the plaintiff's instructions in part, and the defendants' instructions in part, but they are, as a whole, the instructions of the court to the jury. They should so be delivered by the court, and be so received by the jury, and by this court be so examined and passed upon.

This has been done, and a careful examination of them



as a whole does not in our opinion relieve them from the objection that they were not in accord with law, and tend to mislead the jury.

It is said by counsel, "that the objections and assignments of error as to the instructions seem to be general, and an appellate court will not consider the same, for the reason that counsel for appellant did not cite or call the attention of the court below to any particular error in either of said instructions;" and cites as authority therefor, *Griswold v. Boley*, 1 Mont. 549, and *McKinney v. Powers*, 2 Mont. 466.

In *Griswold v. Boley* the court says: "One other specification is as follows: The court erred in instructing the jury for the plaintiff, as they were instructed by the court at the time." This specification is of the like character to the one already considered, and for like reasons cannot claim the attention of the court; and for another reason, the instructions given on behalf of the plaintiff were not excepted to at the time, and for all that appears went to the jury without objection.

We can take no notice of exceptions not taken at the proper time and duly saved; and if this exception had been taken at the time the instructions were given, and this fact had duly appeared in the record, the exception is of such a general character that it does not meet the requirements of the code, which provides that the statement shall specify the particular errors upon which the party will rely.

Exceptions to the charge to the jury ought to point out the specific portions excepted to, and to be made at the time of the trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have fallen into in the hurry and perplexities of the trial. *Hicks v. Coleman*, 25 Cal. 146.

And no exceptions to the instructions to the jury ought to be regarded unless the same are made and presented to the court before the same are finally submitted to the jury.

In *McKinney v. Powers*, 2 Mont. 466, the same doctrine is maintained, and the case of *Griswold v. Boley* affirmed. The court says: "The alleged errors complained of in this action arise upon the instructions of the court to the jury. The record shows that no exceptions were taken to the instructions as given. We have repeatedly held that this court will not consider the correctness or incorrectness of instructions to the jury, unless exceptions were properly taken and saved in the proper time. See *Griswold v. Boley*. Objections to instructions should be specifically pointed out before the case is finally submitted to the jury. The court below should have an opportunity to correct any alleged errors in the instructions, and this can only be done when such alleged errors are designated before the case goes to the jury. Obviously, this opportunity was not presented to the court in this case. The instructions went to the jury without objection, and it is now too late to assign errors upon such instructions, no exceptions having been taken at the proper time."

Section 279, Code of Civil Procedure, provides: "An exception is an objection taken at the trial to a decision upon a matter of law." And section 281 provides further: "The point of the exception shall be particularly stated, except as provided in relation to instructions." Subdivision 5 of section 523 of Civil Code provides: "When the evidence is concluded, and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing and signed by the party, or his attorney, asking the same, and delivered to the court." Sixth. "When the argument of the cause is concluded the court shall give such instructions to the jury as may be necessary, which instructions shall be in writing, and be numbered and signed by the judge." Seventh. "When either party asks special instructions to be given to the jury, the court shall either give such instruction as requested, or positively refuse to do so.

or give the instruction with a modification, and shall mark or indorse upon each instruction so offered, in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused, so that either party may except to the instructions as given, or refused, or modified, or to the modification.

“If any party to the trial desires to except to any instruction given by the court, or to the refusal of the court to give any instruction asked for, or any modification thereof, he shall reduce such exception to writing, and file the same with the clerk before the cause is submitted to the jury.”

The law requires the judge to indicate, by numbering and marking, the instructions offered to him, so that it shall distinctly appear what he gives, refuses and modifies. It also requires the parties to a suit desiring to except to this action of the court to specify the same in writing as to each instruction, and the objection to the same, so that the court may know whether the objection exists to the modification, or the giving, or the refusal of the court to give, the instruction. A general objection to each and all of the instructions, that they are not law, or are misleading to the jury, is not enough.

This is the doctrine of the cases cited and is affirmed in this cause. The objections to the instructions in this case were taken severally and were sufficient.

For the errors above stated this cause is reversed and remanded for a new trial.

*Judgment reversed.*



## KLEINSCHMIDT ET AL., respondents, v. FREEMAN &amp; BARKLEY, appellants.

**PRACTICE** — *How to subject defendants not served to a judgment obtained in probate courts.*—When a judgment has been obtained in the probate court of one county against parties jointly indebted, but service is had only upon part, others residing in another county, such judgment can only be executed against the partnership property of the joint debtors and the individual property of those served.

To make such judgment binding against the debtors not served, the transcript of the judgment in the probate court should be filed with the clerk of the proper district court, and then by *scire facias* the other defendants not served should be brought in to show cause why they should not be made parties to the judgment.

A suit *de novo* in the district court cannot be maintained; but plaintiffs, having elected to proceed by action in the probate court, must put in operation the appliances of law in aid of such judgment, or show cause why it has not been done, before resorting to other remedy or course of procedure.

*Appeal from Third District, Lewis and Clarke County.*

E. W. TOOLE, for appellants.

This action was brought in the court below upon an account stated against the defendants as copartners. An action upon the same demand had theretofore been instituted by respondents against them as such copartners, upon the same demand, in a court of competent jurisdiction in this territory. Service only had upon Freeman; a judgment taken against both upon their joint liability, and an individual judgment rendered against the party served, in pursuance of the statute in such cases provided. Whether under this state of facts the present action can be maintained is the first proposition presented by the record in this case. That it cannot, we respectfully submit the following:

1. The words "joint obligations and covenants," as used in section 3, page 504, Codified Statutes, are used in their legal sense, and do not apply to the liability incurred by copartners, not in writing. To give them

their exclusive popular signification would incur serious mischief and disorder in the administration of the law. At common law all such obligations and covenants were not several, unless expressly made so by the instrument itself. It is an ancient and familiar rule of law that the obligee, even in such cases, must proceed against the obligors jointly or severally; that is, severally against each or jointly against all. Our Practice Act, in force at the time of incurring the liability and trial of the action (72, secs. 42, 420, 425; California, Harston, 414, 489-494), has to some extent changed this rule of the common law, and to that extent afforded a new right and a new remedy. In all such cases the remedy is exclusive. The only course to have been pursued by respondents is expressly marked out by the statute. They could have brought in the defendant not served by *scire facias*, and taken judgment against him, in the absence of a meritorious defense. This is the plain, unequivocal and exclusive right and remedy, in contradistinction to those given at common law.

A several action could not be supported upon an account stated (not in writing) between the parties on a partnership demand, and this is not that character of action if it could be. The joint liability is merged in the joint judgment; while proceeding against one severally bars a recovery upon the joint demand in a separate action. Upon all the various questions involved in this proposition, see Wells' *Res Adjudicata* and *State Decisions*, secs. 34-40; *Tay, Brooks & Backus v. Hawley*, 39 Cal. 98; *Robertson v. Smith*, 9 Am. Dec. 227; *Chicago Legal News*, January, 10, 1880, p. 148; *Freeman on Judgments*, 231, 232; 6 Wall. 235. Engagement joint, not several. Under the statute discussed in this case, contrary to the rule of the common law, the right of action against the parties not served is expressly recognized, while under our statute the right and remedy given requires them to be brought in, and permits answers in the

same suit. But for this at common law the right and remedy became extinct by the original judgment on this demand. This right and remedy has not been pursued, and to this respondents are alone limited. The liability of defendants, if any, is only joint. No several action is maintainable, and the statutory remedy is exclusive. The members of a copartnership, upon a liability like this, cannot be sued severally. The action is a joint action, and the joint liability being merged in the judgment, no other joint action is maintainable. *Kelly v. Van Austin*, 17 Cal. 564; *Tay, Brooks & Backus v. Hawley*, 39 Cal. 93; *Fladay v. Anderson*, 4 Nev. 437 *et seq.*; *Freeman on Judgments*, 231, 232; 4 Ohio, 435; 13 Mass. 148; 2 Gil. (Ill.) 359; 1 Pars. on Cont. (5th ed.) p. 12, note *c.*; *Olmstead v. Webster*, 8 N. Y. 413, bottom of 414; 13 Cal. 31.

2. The action is upon an account stated; the allegation is denied, and the court finds that there is no evidence on the issue. *Cary v. P. & C. P. Co.* 33 Cal. 694; *Foster v. Allinson*, 2 T. & R. 479; *Holmes v. De Camp*, 1 Johns. 36; 45 Cal. 515; *Brady v. Reynolds*, 13 Cal. 31; *Stearns v. Aguirre*, 6 Cal. 182.

3. As to the letter of credit, there is no allegation or proof that credit was given on the strength of it. See 4 Metc. (Ky.) 147; *Brandt on Guaranty & Suretyship*, 157-159, 161, 174; 11 Metc. (Mass.) 361; 22 Pick. 223; 2 McLean, 21.

CHUMASERO & CHADWICK, for respondents.

This action was brought in the district court of Lewis and Clarke county upon an account against the defendants, accrued and payable in said county, defendants at that time residing and doing business in Jefferson county.

The defendant Freeman having subsequently removed from Jefferson county to Deer Lodge county, an action was commenced by plaintiffs against the defendants in the probate court of Deer Lodge county. Service was had on Freeman alone, the defendant Barkley not having



been found or served, he being a non-resident of Deer Lodge county and beyond the jurisdiction of the court, so that no legal service could be made on him.

We agree with the appellant that sec. 3, p. 504, Codified Statutes, being sec. 772 of the Revision, is not applicable to contracts made and entered into by partners as a firm.

Section 42, Codified Statutes, being the same law in force when the action was brought, we submit, even if constitutional (which we do not admit), does not affect this case. At the time the action was brought in Deer Lodge, Barkley was non-resident, and resided in Jefferson county. See Record, p. 16, lines 3, 4, 5 and 6; also p. 18, lines 17 to 23. There could have been, therefore, no personal judgment rendered against Barkley, nor one which could in any way affect his rights or property. *Treat v. McCall*, 10 Cal. 511. See, also, case in 39 Cal. 93, cited by appellant. In that case the question was whether an action could be maintained on the *judgment* as against the party not served, and the court held that it could not, and that the party not served was not a proper party to the suits on the judgment. That the only mode by which he could be bound by the judgments was under that statute. Here we do not sue on the judgment, but on the original account.

In that case, also, it does not appear but that the defendant not served was within the jurisdiction of the court.

The probate court is an inferior court of limited jurisdiction, and had no power or authority to subject a non-resident of the county in which it was held to its jurisdiction. R. S. p. 190, sec. 688. It cannot send process beyond the territorial limits of the county in which it is held. It follows, therefore, that the defendant Barkley is to be treated as he would be if he were a non-resident of the territory. That he could not be brought in and made a party to the judgment even by *scire facias*, as assumed by appellant. And we submit that this action was not

merged in the judgment rendered against Freeman. Wells on Res Adjudicata, sec. 41; *Olcott v. Little*, 9 N. H. 261; *Tappan v. Buren*, 5 Mass. 196; *Dermott v. Cheek*, 2 Greenleaf, 192; *Brown v. Birdsall*, 29 Barb. 551; *Johnson v. Smith*, 23 How. Pr. 444; *Oakley v. Aspinwall*, 4 N. Y. 513; *Sheepy v. Mandeville*, 6 Cranch, 253; *Bonesteel v. Todd*, 9 Mich. 239; *Wilson v. Eldred*, 6 Wall. 239.

The last case (cited by appellant) is to the effect that the demand against parties not served is not merged in the judgment against the party brought into court.

This case differs from the cases where a plaintiff has elected to sue and has obtained a judgment against one of several joint debtors, or where there are dormant partners. It is one where both joint debtors are made parties, and where, by reason of non-residence of the defendants not served, no jurisdiction vested in the court, and a judgment against such non-resident defendant could not be rendered. Freeman on Judgments, secs. 219, 233, 234; *D'Arcy v. Ketchum*, 11 How. 165; *Bonesteel v. Todd*, 9 Mich. 321.

The judgment pleaded by the defendant Barkley was not rendered in a cause between the same parties. In this case the suit was upon an account due to Albert Kleinschmidt and Charles Mayne. The action in the probate court of Deer Lodge county was one in favor of Albert and Charles Kleinschmidt.

As to the point made in the brief of appellant, that the present action is based upon an account stated, we deny that it has any force. The action is upon an account for goods sold and delivered, alleging the sale and delivery and non-payment, being all the facts necessary to be alleged in the complaint. It was unnecessary to allege a promise to pay. *Higgins v. Germaine*, 1 Mont. 230; Codified Laws 1872, sec. 49; *Allen v. Patterson*, 7 N. Y. 476; *Green v. Palmer*, 15 Cal. 412.

The averment in the complaint, that, after the sale and delivery of the goods, the parties accounted together, is

mere surplusage, and might have been stricken out on motion, and the complaint would have remained good. Surplusage will not invalidate.

Whether this allegation, however, be or be not surplusage can make no difference, as there was no denial of the allegation in the answer, and evidently the appellant either considered it as surplusage, or was unable truthfully to deny it, and upon the pleadings alone the plaintiffs were entitled to judgment.

CONGER, J. This was an action in the district court of Lewis and Clarke county upon an account for goods, wares and merchandise alleged to have been sold by plaintiffs' assignees to the defendants Freeman & Barkley, at the town of Helena in said county, during the years 1873-4. The defendant Barkley answered and set forth that on the 6th day of July, 1876, the assignees of the claim and account mentioned in the complaint instituted an action for the recovery thereof in the probate court of Deer Lodge county against these defendants; that a summons was issued therein and duly served upon the defendant Freeman; that on the 18th day of August, 1876, such proceedings were had and done as that a judgment was rendered in said probate court against the defendants therein, which was and still is enforceable against the goods and chattels of the defendant Freeman and the joint property of Freeman & Barkley; that the alleged joint liability of these defendants, as well as the contract sued on, is merged therein, and that by reason thereof the plaintiffs are barred from maintaining this action. The judgment roll of the case in the probate court is attached to and made a part of this answer, from which it appears that Albert and Charles Kleinschmidt, as partners, filed a complaint in said probate court against Freeman & Barkley, as partners, upon an account for goods, wares and merchandise sold by the former to the latter, upon which a summons was issued and duly



served upon the defendant Freeman, the defendant Barkley not being found in said county. Afterwards, a judgment in due form was rendered against Freeman, as upon a default, to which is added these words: "This judgment is to be enforced against the joint property of the defendants (Freeman & Barkley) and the separate property of the defendant Freeman."

The plaintiffs herein failing to reply, the defendant Barkley moved for judgment on the pleadings, which motion was overruled, and the court found, among other things, as matters of fact, that at the date of the institution of the action in the probate court of Deer Lodge county, and ever since, the defendant Barkley resided in the county of Jefferson in said territory; that the partnership between Freeman & Barkley was dissolved on the 28th day of April, 1873; that the firm of Freeman & Barkley, on that day, was indebted to the plaintiffs in the sum of \$140.66, and that there was no testimony showing or tending to show that the same has ever been paid. Whereupon judgment was rendered against Barkley for that amount, from which he appeals to this court.

1. What effect had the judgment so rendered against Barkley in the probate court of Deer Lodge county upon the right of the plaintiffs to maintain an action against him upon the same account or contract in a proper district court of the territory?

The code of 1872, under and by virtue of which the judgment in the probate court of Deer Lodge county was rendered, provided in section 42 as follows: "When the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: First. If the action be against defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise direct; and if he recover judgment, it may be entered against the defendants thus jointly indebted so far only as that it may be enforced

against the joint property of all, and the separate property of the defendants served. Second. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants."

This statute authorizes the rendition of a judgment against a defendant without giving him an opportunity to be heard. It says that he may be subjected to liability, and that his property may be taken on execution, before he has had his day in court. It authorizes a defendant, if sued on an alleged joint indebtedness, to confess judgment thereon, and thereupon this judgment may be enforced against what the plaintiff claims to be the joint property of the defendant so confessing and a co-defendant not served.

Has the plaintiff alone the right to be heard upon the question of the joint indebtedness of the defendants, or as to their joint property? Does the law authorize a judgment and execution upon a mere *ex parte* proceeding, where the defendant has not ever been given an opportunity to make a defense? Has not the defendant not served a right to be heard as to his joint liability to plaintiff, and as to his joint ownership of property with his co-defendant?

We agree with the supreme court of California, 39 Cal. 98, in the case of *Tay et al. v. Hawley*, wherein it expresses its opinion of this statute (ours being borrowed from that state), as follows: "The statute in terms authorizes the entry of judgment of the character of the one presented in this case, where suit is brought on a joint contract, and one or more, but not all, of the defendants are served with process." The section provides that, "if the action be against defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise direct;" that is to say, unless the court requires the other defendants to be served before proceeding to trial and judgment. If

he does proceed against the defendant served, the section provides that he shall take judgment against all of the defendants, to be enforced against the joint property of all the defendants and the separate property of those served. By the terms of the statute, the plaintiff proceeds only against the defendants served, and the judgment is entered against them, but not against those not served. The defendants not served are not bound by the judgment, nor are they personally liable for its satisfaction; but the statute provided that the property in which they are jointly interested with the other defendants may be taken in execution for the satisfaction of the judgment.

When cases involving this or similar provisions of the statutes of other states have been under consideration, it has been repeatedly held that the statute changed the common law rule, which is that, in an action upon a joint contract, the plaintiff must recover against all or none. *People v. Frisbie*, 18 Cal. 402; *Lewis v. Clarkson*, id. 399. The language of these cases clearly indicates that under the statutory rule the plaintiff may recover upon a joint contract against one, or any number less than all, of the joint debtors; that is to say, he may take judgment in the usual form against those served, and, in addition, the judgment may be entered against the joint property of all the debtors. But the judgment is against those only who were served with process.

The statute provides that the "joint property of all the defendants may be taken in execution for the satisfaction of the judgment, but none of the cases in this court define such joint property. We have not noticed in any of the cases in New York that the question has been distinctly passed upon, as to what property constitutes the joint property" mentioned in the statute; but it is assumed in several cases that it is partnership property which is meant by the term. *Mason v. Denison*, 15 Wend. 64; *Merwin v. Kambel*, 23 Wend. 293; *Sterne v.*



*Bentley*, 3 How. Pr. 331. In *Mason v. Denison*, it is said that the term applies to the property which one defendant might apply to the satisfaction of the debt, without consulting his co-contractor. Accepting the restriction in that case, and limiting the meaning of "joint property" to partnership property of the persons alleged to be joint debtors in conformity with section 25, p. 44, Revised Statutes, which says: "When two or more persons associated in the same business transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such case being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants and had been sued upon their joint liability." Which law is in conformity with all the authorities, if, when the law says "shall bind joint property of associates," it be held to mean partnership property, which is the construction we put upon the section. Either partner has the right to have the partnership property first used in payment of the debts of the partnership, and such property is, under the law, liable to and entitled to be taken in satisfaction of partnership debts.

And further, under the law, in order to bind such property, it is only necessary that service be had on one of the partners of a firm. This is sufficient to bring the firm or company into court; and when once within the jurisdiction they are bound by the judgment of the court, so far as their partnership interests are involved.

This view of the law does not conflict with the principle that a person must have his day in court before his private property shall be bound by the action of the court, for, in law, business is a united business — a unity in fact. Service on one binds the firm; and so judgment upon one binds all the partnership property, for the acts of one are the acts of all, in law.

The plaintiffs in this cause brought suit against two partners, Freeman & Barkley. They had service on Freeman. They recovered judgment against Freeman alone, subject to be made out of the separate property of Freeman and the joint property of Freeman & Barkley.

In view of what has been said above, their judgment should have been against Freeman & Barkley, partners, etc., and Freeman, to be collected from the firm assets and the private estate of Freeman. This judgment does not bind the private estate of defendant Barkley. He has not had his day in court, and without that he cannot be bound, nor his private estate held to be liable.

We next consider when the property liable is not sufficient to discharge the indebtedness, how shall the other partners be made liable for the debt.

Title X, ch. 1, sec. 420 *et seq.* of the Revised Statutes of 1871-2, and sections 446 *et seq.* of Laws of 1879, which are the same, provide: "When a judgment is recovered against one or more persons jointly indebted, those who were not originally served, and did not appear in the action, may be summoned to show cause why they should not be bound by the judgment. The summons shall describe the complaint, and it shall not be necessary to file a new complaint. The summons shall be accompanied by an affidavit that the judgment or some part thereof remains unsatisfied. Upon such summons the defendant may answer or deny; and if he denies his liability, a copy of the original complaint and judgment, the summons with the affidavit affixed, and the answer, shall constitute such written allegations."

It will be seen by the above, that the way is clear if the judgment were in the district court. But it is said the original judgment is in the probate court, and so it is.

By the second section of the organic act (amendment) probate courts are given jurisdiction in their several counties. The ninth section of the act provides that

their jurisdiction shall be as limited by law, and the statute limiting their powers confines them to their respective counties and to claims of \$500 or less. The amount sued for was within the court's jurisdiction.

If this judgment had been obtained in the district court, no question would have arisen as to the proper manner of making the defendant not served a party to the judgment. It has already been stated.

The difficulty appears to be to do this on a judgment from the probate court. As the probate court was in the first instance unable to bring the defendant Barkley before it by summons, there is now no more power to bring him before it to make him a party to the judgment than before, because he is a non-resident of the county in which the suit was begun, the power of the court being limited to the county in which it is situate.

By section 690, Civil Code, Revised Statutes, provision is made for filing a certified transcript of a judgment recovered in the probate court with the clerk of the district court of the county where such judgment is recovered, in the same manner as judgments rendered in said district court.

By reference to the tenth subdivision of section 1, Probate Practice Act (chapter 1), it is seen that "the proceedings of probate courts shall be construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, judgments and decisions there is accorded like force and effect and legal presumptions as to the records, orders, decrees and judgments of the district court."

There is thus attached to a judgment so filed, and to be accorded to it, like force and effect and legal presumptions as to the records, decrees and judgments of district courts.

When, therefore, the certified copy of a judgment from the probate court is so filed in the district court, there attaches to it the force, effect and legal presump-



tions of a judgment originally rendered in the district court.

The law looks not with favor upon a multiplicity of suits; and it follows that the same parties as partners could not be subjected to two different and independent suits and judgments for the same cause of action brought by the same plaintiffs.

The proper mode of procedure in this cause was to bring the judgment of the probate court into the district court, and afterwards by *scire facias* bring in defendants not served to show cause why they should not be made parties to the judgment.

At the time defendant moved for judgment on the pleadings, the record showed that no execution had been issued on the judgment of the probate court against Freeman. Plaintiffs having elected to take judgment in that court, they must put in operation the appliances of the law in aid of the judgment, or show good cause why this has not been done, before any other remedy could be resorted to for collection of the debt. This not having been done, defendant's motion for judgment should have been sustained.

For this and the preceding error this cause is reversed and remanded, with directions to the court below to enter judgment on the pleadings.

*Judgment reversed.*

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RUSSELL, respondent, v. HOYT ET AL., appellants.

EVIDENCE — *Declaratory statement must be on oath — Judicial notice.* According to the act of the Montana legislature of May 8, 1873, the declaratory statement of location of a quartz mining claim, required to be recorded, must be on oath. Objection to the introduction of such a declaratory statement in evidence when the same is not sworn to as required was properly sustained by the court.

Courts will not take judicial notice of the situation of a private claim

on land or mining ground, or its distance from the seat of government. It is the duty of those claiming the benefit of any exception to the general application of any statute to make such fact appear by proof.

PLEADING — *Time of making objection to want of a replication.*— The objection that there was no replication to the answer among the pleadings cannot be made for the first time in the appellate court.

*Appeal from Third District, Lewis and Clarke County.*

CHUMASERO & CHADWICK, for appellants.

1. The verdict was against the weight of evidence. There was not sufficient to justify the verdict, and it was against law.

(a) The plaintiff failed to show title in himself.

(b) He failed to show that his location contained a vein or lode containing precious metals. *Overman S. M. Co. v. Ceredran*, 15 Nev. 152; Laws U. S. sec. 2320; Laws of M. T. 1864, p. 327, secs. 2, 5; *Foote v. Nat. M. & Ex. Co.* 2 Mont. 403; *McKeon v. Frisbee*, 9 Cal. 137; Sickels' Mining Laws, p. 64; *Wolfley v. Lebanon M. Co.* 4 Col. 116, 117.

(c) The plaintiff's survey for adverse claim varied materially from his recorded notice of location. See Evidence of Foote, pp. 25–29, and plat; Essler's Evidence, pp. 29, 30, 32; Gilmour's Evidence, pp. 37, 38; Marsh's Evidence, p. 20; Act of Congress of 1866 (14 Stats. p. 467); *Gleeson v. Martin White Co.* 13 Nev. 442; *Golden Fleece v. Cable Co.* 12 Nev. 330.

(d) The evidence showed that the Russell and Mammoth lodes were entirely distinct and separate veins. Evidence of Foote, above referred to; also evidence of Essler, above referred to. See, also, evidence of Perry, pp. 31–33, line 10; also evidence of Davis, p. 35, and of McDonald, on same page; also see plat. The evidence further showed conclusively that the surface ground of the Russell location did not include any part of the Mammoth lode.

(e) Even if the location of the Russell lode was a valid location, the evidence shows that the plaintiff permitted

the defendant to go to work and make a discovery on the Mammoth lode without objection, and he is estopped thereby from asserting claim thereto. *Crossman v. Pendery et al.* U. S. Dist. Court Colorado, April term, 1881, opinion by Miller; Chicago Legal News, July, 1881, p. 368.

2. The court below erred in admitting in evidence the record of the location of the Russell lode. Stats. of M. T. 1864, p. 327.

3. The plaintiff's action was barred by the statute of limitation of Montana territory, which was set up in the answer and which was not denied by any replication; no replication having been filed to such answer. See Laws of M. T. 1872, p. 591, sec. 2; *420 Company v. Bullion Co.* 9 Nev. 240 (S. C. 3 Saw. 644, 657). And the court erred in refusing to permit defendant to introduce evidence on that point.

4. The court permitted the plaintiff to introduce evidence of the character and value of the so-called Russell vein, and erred in striking out the evidence offered by defendant in contradiction. First, because such evidence tended to show that such lode was of no value. Second, because the evidence offered by defendant tended to the impeachment of plaintiff. *Foote v. N. M. & Ex. Co.* 2 Mont. 403; Sickels' M. Laws, p. 64; 9 Cal. 137; *Crossman v. Pendery*, heretofore cited.

5. The court below erred in excluding from the jury the notice of location of the Mammoth lode. It was competent evidence and was not denied by replication.

(a) The lode was located under the laws of 1872, p. 523, sec. 5, under which law the proper affidavit or oath was made.

First, we deny that any oath was necessary under the act of congress in force. Sickels' M. Laws, p. 164, Dec. of Secretary of Interior.

(b) Second. That if a different oath from the one contemplated by the law of 1872 was provided by the law of May 8, 1873, that it was not in force at the time and



place where the Mammoth lode was situated. The law of 1872, p. 506, sec. 1, provided that one day should be allowed for each fifteen miles of distance from the seat of government before the law should go into effect. Re-enacted in the Revision, p. 774, sec. 785.

6. The court below refused to take judicial notice of the *situs* of the Mammoth lode; of the place where the seat of government was; of government surveys; of the boundaries of counties, townships and ranges — notwithstanding the exact *situs* of the premises was admitted by the pleadings; the county, mining district, township, range and government survey.

The act of 1873 was passed at the then seat of government in Madison county, at Virginia. We contend that the court was bound to take judicial notice of that fact; of the boundaries of Madison county and of the other counties of the territory, and their distance from each other as fixed and established by law. See Laws of 1872, p. 430, secs. 2 and 6, establishing the boundary lines of counties by courses and natural objects laid down and located upon government maps, from which distances could be calculated; and from which it is demonstrable that the distance from Virginia City to the Mammoth lode is over one hundred and fifty miles; so that the law of 1873 could not have gone into effect until the 19th or 20th of May, 1873. We cite on this question, as to what facts the court is bound to take judicial notice, the following authorities: Judicial notice will be taken of the government surveys of public lands: *Mossman v. Forest*, 27 Ind. 233; *Hill v. Bacon*, 43 Ill. 477; *Atwater v. Schenck*, 9 Wis. 160; *Wright v. Phillips*, 2 Greene (Iowa), 191; *Kile v. Town of Yellowhead*, 80 Ill. 208; *Gardner v. Eberhart*, 82 Ill. 316; *Murphy v. Hendricks*, 57 Ind. 457.

(b) Of distances as calculated on a map: *Monflet v. Cole L. R. En. Co.* 71; 1 Wharton on Ev. p. 294, sec. 335.

(c) Of what is generally known within the limits of

the court's jurisdiction: *Brown v. Piper*, 1 Otto (91 U. S.), 371.

(d) Of the boundaries of the several states and judicial districts: Same case.

(e) Of leading geographical features of the land: *United States v. La Veageance*, 3 Dal. 297; *Peyroux v. Howard*, 7 Pet. 342; *Mossman v. Forest*, 27 Ind. 233; *Cash v. Auditor of Clark Co.* 7 Ind. 227.

(f) The courts of particular states are bound to take judicial notice of its boundaries and its division into towns and counties, and the limits of such divisions and of its judicial districts: *Lyell v. Lapeer Co.* 6 McLean, 446; *United States v. Johnson*, 2 Saw. 482; *Buchanan v. Whitman*, 36 Ind. 257; *Goodwin v. Appleton*, 22 Me. 453; *Ham v. Ham*, 39 Me. 313; *Keyser v. Coe*, 37 Conn. 597; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *State v. Powers*, 25 Conn. 48; *Com'rs v. Spitzler*, 13 Ind. 235; *Ind. & Cin. R. R. v. Case*, 15 Ind. 42; *Buckingham v. Gregg*, 19 Ind. 401; *Hinckley v. Beckwith*, 23 Wis. 328; *Wright v. Hawkins*, 28 Tex., 452; *Brown v. Elms*, 10 Humph. 135; *King v. Kent*, 29 Ala. 542; *People v. Robinson*, 17 Cal. 363.

(g) The position of leading cities and villages: *Price v. Page*, 24 Mo. 65; *Bell v. Barrett*, 2 J. J. Marsh. 516; *Seigbert v. Stiles*, 39 Wis. 533; *Neaderhouse v. State*, 28 Ind. 257; *Dickinson v. Breedon*, 30 Ill. 279; 1 Whart. Ev. 327 to 340, inclusive; Greenl. Ev. vol. 1, ch. 2.

The court below, in giving the instruction asked for by plaintiff, ignored entirely the admissions of the pleadings, took all questions in the case from the jury, and was not justified by the pleadings or evidence in the case, and was error. See Record, p. 48; Answer, p. 9.

The several instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 were each one of the law applicable to the case and should have been given.

The thirteenth instruction should have been given. It was law and applicable to the case.

We call attention to the several bills of exception taken by defendant on the trial.

E. W. & J. K. TOOLE, for respondents.

1. By reference to the record, p. 61, it will be seen that there were but three specifications made in reference to the insufficiency of the evidence in appellants' motion for a new trial. To these alone are they limited, and additional points made in their brief will not be considered. Upon this subject the jury were the judges of the evidence; there was a substantial conflict in it, and the court will not in such cases disturb the verdict.

2. There was no estoppel pleaded; none relied upon; no evidence to support any; and no point made on account of it in the motion for a new trial. There is nothing in the point sought to be made, and it could not be entertained under the record in this case even if there was.

3. It is too late now to object on account of the want of a replication; the point should have been made before the trial proceeded, so as to have given plaintiff an opportunity to supply the pleading, if any were necessary. The complaint, however, alleges ownership, possession and right of possession prior to defendants' entry, and continued down to the commencement of the action. See *Keyser v. Cannon*, 29 Ohio St. 1359.

4. If the record of the Mammoth lode was fatally defective under the laws of the United States and territory, then the defendants have no cause of complaint. They neither had possession, right of possession, or a right to a patent under the mineral act, and were consequently in no situation to avail themselves of any of the errors assigned in this case.

None of the authorities cited by appellants are in point. None of them go so far as to say that the court would take judicial notice of the distance from the capital of the territory to the Mammoth lode. The general



rule is that a statute takes effect from and after its passage. Appellants should therefore have brought themselves within the exception by showing the distance from the seat of government to the lode in question. This they did not even attempt to do.

Besides, it will be seen that the act in question was passed on the 8th day of May, 1873; that it had reference to the *records* of lode claims, and nothing else. It leaves all other matters just where the laws of the United States have left them. This record, to which the act applies, was made on the 29th day of May, 1873, twenty days after its passage. This would, according to the theory and computation of counsel, far exceed the distance claimed.

We contend and insist that this is decisive of this case adversely to appellants.

#### REPLY OF APPELLANT.

The respondent cites only one authority in his brief to sustain any of its propositions, and that upon a point which, in the view of the case taken by appellant, and as shown by the record, was not of paramount importance. The statute of limitations was pleaded, and the appellant offered evidence to sustain his claim of adverse possession.

If it was not a fact admitted by the pleadings, it was a proper subject of evidence, and it was error to exclude such evidence.

If it was a fact admitted by the pleadings, the appellant was entitled to judgment.

As to the necessity of the denial of the defense of adverse possession, see R. S. p. 29, sec. 107.

It is not, as assumed by respondent, the duty of one party to an action to suggest what shall be the character of the pleading of another. The case must be determined by the issues joined between the parties.

The act of May 8, 1873, was not in force and did not

take effect at the place where the Mammoth lode is located until certainly the 19th day of May, at least six days after the lode was discovered; and we urge that it had no application whatever to a lode discovered before it went into full force and effect. The law is limited in its operation to those lodes discovered after it did go into effect.

On the question of judicial notice no authorities are cited by respondent, and those cited by appellant remain entirely unanswered.

WADE, C. J. Plaintiff claiming by virtue of his location of the J. H. Russell lode situate in the Ten Mile Mining District, Lewis and Clark county, and having filed his protest and adverse claim to the application of the defendants for a patent to the Mammoth location, brings this action to have determined the right of possession to the ground in dispute. The plaintiff's location was made in July, 1867, under the law of 1864, and answers all the requirements of the law. There was no issue in the pleadings as to a discovery upon this location, and all testimony upon that subject was properly excluded from the jury.

The defendants base their right to the Mammoth lode upon a notice of location recorded on the 29th day of May, 1873. To this notice there is an affidavit attached stating that the locators are citizens of the United States and of the territory, but the matters and things contained in the notice or declaratory statement are not sworn to.

On the trial the plaintiff objected to the introduction of this notice and declaratory statement in evidence, which objection was sustained, and upon this action of the court the defendants assign error.

On the 8th day of May, 1873, twenty days before the Mammoth location was made and recorded, the following act of the legislature was approved and became a law:

“Any person or persons who shall hereafter discover any mining claim upon any vein or lode bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, shall within twenty days thereafter make and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof in writing, *on oath*, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States;” which act took effect and was in force from and after its passage.

The following act was in force at the date of the passage and approval of the foregoing: “All acts and joint resolutions which declare that they take effect from and after their passage and approval by the governor are hereby declared to take effect only at the seat of government; and in other portions of the territory, allowing fifteen miles from the seat of government for each day.”

The act of May 8, 1873, was enacted and became a law at a session of the legislative assembly at Virginia City, then the seat of government of the territory, and appellants contend that the court ought to have taken judicial notice of the place where the Mammoth lode was located and its distance from the seat of the territorial government, and that by such notice, and without proof, to have determined and declared that the Mammoth location was so far distant from the capital of the territory as that the act of May 8th was not in force as to it, at the time the same was made and recorded, on the 29th of May, 1873.

Courts will take judicial notice of what is generally known within the limits of their jurisdiction: of the divisions of a state or territory into towns and counties; of the leading geographical features of the land; of the position of important cities and towns, and of the government surveys of the public lands; but we are not aware of any principle or authority that would authorize or require a court to take judicial notice of the place where mere private property is situated, or its distance



from the seat of government of the political division within which it is situated. Only matters of public importance and notoriety are within the scope of what courts will take judicial notice of. Matters of mere private concern, as the location or situation of a farm or a mining claim, or their distance from the seat of government, are not within the operation of the principle.

The act of May 8, 1873, was by its terms in force from and after its passage. If the defendants were within the exception they ought to have made that fact appear by proof.

The objection to the introduction of the declaratory statement of the location of the Mammoth claim was properly sustained. The defendants basing their rights upon this declaratory statement, they had no standing in court without it. Possession without a valid location could not affect the rights of plaintiff. The right of possession comes only from a valid location. A location is not valid without a declaratory statement on oath. Without such a location the defendants could not question the plaintiff's rights on the premises.

The objection that there was no replication to the answer cannot be raised for the first time in this court. If a replication had been necessary the question ought to have been raised in the court below, where the same might have been supplied.

The judgment is affirmed, with costs.

*Judgment affirmed.*

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HAMMOND ET AL., respondents, v. FOSTER ET AL., appellants.

AMENDMENT OF PLEADINGS.—It is in the discretion of the court to refuse to allow amendments to pleadings, if in its judgment they are not needed or warranted by the facts of the case.

STRIKING OUT EVIDENCE.—It is error in the court to strike out or withdraw from the consideration of a jury evidence that is competent under the pleadings.

WITHHOLDING INSTRUCTIONS FROM JURY, THOUGH BY MISTAKE, GROUND FOR NEW TRIAL.—It is cause for granting a new trial if important instructions given by the court were not sent in to the jury, with others, though the omission was unintentional. Either the jury should have had all or none of the instructions given.

*Appeal from Second District, Silver Bow County.*

J. C. ROBINSON, for appellants.

Defendants should have been permitted to amend their answer as asked (see pp. 19 and 20 of transcript), so as to present their defense, and to make their answer conform to the evidence given. *Stringer v. Davis*, 30 Cal. 320; *Valencia v. Couch*, 32 Cal. 344; *Hirshfield v. Aiken*, 3 Mont. 453; *Hartly v. Preston*, 2 Mont. 415; *Wormal v. Reins*, 1 Mont. 630; secs. 114, 117, Practice Act.

Viewing this as a variance in the evidence from the answer, the amendment should have been allowed while it might properly be regarded. Secs. 110, 111, Practice Act; 3 Wait's N. Y. Pr. 165, 166, 167.

After the evidence of Hughes, as contained in said exception, p. 19, was admitted without objection by plaintiffs, and he had been cross-examined by plaintiffs relative thereto, it was error to strike it out and withdraw it from the jury. *People v. Long*, 43 Cal. 445.

The court erred in admitting in evidence the letter of Connell to Bonner, p. 23. It was not competent, being hearsay; was merely the declaration of Connell, the agent of plaintiffs, not under oath, to one of plaintiffs, as to what Foster said, and defendants had no opportunity of cross-examining Connell as to what Foster said. In the first place, the declaration of the agent to the principal, whether oral or written, is not proper evidence, is incompetent; and second, if it was proper to prove the declarations or admissions of Foster, it should have been done by Connell himself. Greenleaf on Evidence, secs. 99, 124; Wharton on Evidence, sec. 172, p. 173; sec. 175, first and last part.

The letter does not fall within any of the exceptions. 1 Greenleaf on Evidence, sec. 123.

Unless it clearly appears by the record to the contrary, injury will be presumed from admitting improper testimony. What influence the letter from Connell to Bonner had on the jury the court cannot say. By insisting on its introduction plaintiffs considered it material, and intended it to have some influence. *Lally v. Wise*, 28 Cal. 542; *Grimes v. Fall*, 15 Cal. 64; *Roff v. Duane*, 27 Cal. 569.

The evidence was offered for a particular purpose, and in so offering it plaintiffs stated that they would follow it up and prove that Foster refused to take any more meat, which plaintiffs failed to do, and said evidence was not withdrawn. See evidence of plaintiffs — Bonner, pp. 39, 46; Connell, 40.

The second instruction of plaintiffs, p. 28, assumes that there was a subsequent contract set out in the answer of defendants, and changed the burden of proof to defendants to establish. Such is not shown by the answer, and the burden of proving the contract was on the plaintiffs, and said instruction is error. See p. 6 of answer.

The same objection exists as to the fourth instruction, p. 29.

The seventh and eighth instructions, given at plaintiffs' request, were erroneous, for the reasons: It was an issue presented by the pleadings (see Answer, p. 6, and Replication, p. 16) whether or not plaintiffs agreed to deliver defendants all their bacon in Missoula county which the plaintiffs should ship to Butte that season. Foster testified (p. 45) that such was the contract; and also, in June, 1880, Bass, one of the plaintiffs, took eleven thousand pounds of bacon to Butte, and sold the same to other parties than to defendants (p. 45); and Bonner testified (p. 47, at bottom) that the bacon which Bass took to Butte and sold to others than defendants in



June, 1880, was bacon which belonged to plaintiffs, but prior thereto the other plaintiffs sold their interest in it to Bass.

Plaintiffs could not escape liability on the contract by selling to Bass, and Bass do with the bacon what all of plaintiffs could not do. It certainly would have been a breach of the contract for all of plaintiffs to have hauled the bacon which they had in Missoula county to Butte and sold the same to other parties than defendants, and, if so, we can see no difference in its aspect in a sale thereof by plaintiffs to plaintiff Bass, and his selling to others than defendants. In such case the act of plaintiff Bass was the act of all of plaintiffs. And if this be correct, those instructions are wrong, and the third instruction asked by defendants should have been given (p. 34).

A new trial should have been granted on account of the failure, by accident, as appears by affidavit (p. 37), to give defendants' fifth instruction asked, and marked "given" by the court (p. 37). Said instruction should have been given to the jury, for the reason that it was a question for them to consider whether or not the bacon sold by Bass in June, 1880, was not the bacon of all of the plaintiffs.

The verdict was against the law as embodied in defendants' fourth instruction (see p. 34), and against the evidence of the contract. There was a material variance between the complaint and proofs, in that the complaint set out a cause of action in *assumpsit*, using a common count, and the proof showed a special contract.

HIRAM KNOWLES, for respondents.

The amendment to the answer did not correspond to the evidence introduced. See pp. 19 and 20 of transcript.

The evidence was as follows: "And among other things it was agreed on part of plaintiffs that they would protect defendants against the shipment of bacon to the Butte market by any one else, from Missoula county,

and as to any bacon, etc., of plaintiffs, in said county." See p. 19 of transcript.

The amendment offered is as follows: That by the terms of said contract said plaintiffs guarantied and promised defendants that no other parties should take any bacon, hams or shoulders to said Butte market from said Missoula county, of the bacon, hams and shoulders of, and then ordered or put up and cured by, said plaintiffs or said plaintiff Bass, except to defendants.

There is a great difference between a contract to protect a party against shipments, and a contract that guaranties that no other parties shall ship or take any hams from Missoula county of the bacon, hams and shoulders of, and then ordered or put up and cured by, said plaintiffs or said plaintiff Bass. The amendment and the evidence did not cover the same ground. There was no evidence that any amount of meat had been ordered by any one.

Again, the contract as testified to was indefinite. How long were plaintiffs to protect defendants? Forever? Was it a covenant running with the existence of Missoula county? The proposed amendment was indefinite. It does not appear in this, or anywhere in the original answer, that defendants had ordered any bacon, hams and shoulders from Missoula county. It does not specify where these hams, shoulders and bacon were put up and cured. If it means then put up and cured, it does not show that any of the hams, bacon and shoulders then put up and cured were ever sold in the said Butte market to others than defendants. It does not show whether the said Bass took and sold said meat on his own account or in partnership or joint account. The time this guaranty and promise was to continue is nowhere specified in the answer. Bonner was not required to deliver any meat after the states bacon arrived, according to the evidence of Hughes, a witness for defendants. See p. 43 of transcript. There are no allegations in this amendment that

defendants relied upon these promises and guaranty, and there are none in the amended answer which by any fair intendment can be made to apply to the same.

Again. It is difficult to see where said amendment comes into the answer in this transcript. There seems to be no place where the same can be placed that it will not confuse and render unintelligible the rest of the answer. An immaterial amendment should not be allowed. *Levenson v. Schwartz*, 22 Cal. 230. There is no affidavit of merits, as required by sec. 114, p. 60, of the laws of Montana of 1879, and no record of any waiver of such affidavit. The refusal presumed to be right.

Lastly. The filing of a pleading in this manner rests in the discretion of the court. *Moak's Van Santvoord's Pl.* pp. 827-29; *Cook v. Spears*, 2 Cal. 409; *Stearns v. Montgomery*, 4 Cal. 227; *McMinn v. O'Conner*, 27 Cal. 247-48; *Felch v. Beaudry*, 40 Cal. 439.

The court committed no error in admitting the letter of Connell to Bonner.

First. It is not true that defendants had no opportunity to cross-examine Connell as to what Foster said. See transcript, p. 41, Connell's evidence.

Second. The rule of law is that when a fact, such as was communicated in that letter, comes to the knowledge of an agent, it is his duty to communicate the same to his principal; and the law presumes he will do his duty, and hence the principal is warned by such notice, and can act on the same. *Wade on Notice*, secs. 33, 688, 690; *The Distilled Spirits*, 11 Wall. 356. The only object in introducing this letter as specified, at the time, was to show actual notice to plaintiffs of this determination of Foster & Co. See p. 23 of transcript. How could the defendants be prejudiced by the plaintiffs proving a fact which it was presumed in law was the case? The plaintiffs should not have been forced to rely on the legal presumption of a fact when they could prove it. But even if this was wrong, no new fact was



introduced into the case when the legal presumption was that the fact existed. There could have been no injury, then, to defendants by the introduction of this letter.

Now, it is claimed that plaintiffs offered to follow this up, and did not. This is not true. They proved the notice of Foster & Co. by Connell. See p. 41 of transcript. It never was proposed to show that Foster & Co., as a matter of fact, had not taken more meat, but that they had notified Connell, agent of plaintiffs, that they would take no more.

Again. In the evidence of both Connell and Bonner, it is testified to without objection, that Connell notified Bonner by letter that Foster & Co. would take no more meat. See Bonner's evidence, p. 47 of transcript; also Connell's evidence, p. 41 of transcript. This evidence contains as much as the letter. The defendants could not have been prejudiced by striking out evidence not material to any issue.

As to the second instruction, there was certainly some evidence that Foster & Co. claimed a subsequent contract as to the price of lard. See Connell's evidence, p. 40 of transcript; also Bonner's evidence, p. 47 of transcript.

Now, by referring to the judgment, p. 2 of transcript, it will be seen that the jury found for plaintiffs only \$300, when the claim was for \$356. So the jury, it is evident, found against plaintiffs as to the price of this lard, specified in said instruction, and no damage was done. When the court examines even the evidence in this record, it will see that the defendants nowhere stuck to their answer. That the contract testified to, and that set up in defendants' answer, was much different. And the instructions were confined much to the issues presented by the evidence, and not to the issues presented in the pleading.

All there was in the fourth instruction is, that defendants had set up a contract with plaintiffs affirmatively,

and had claimed damages for a breach of the same as an offset against plaintiffs' demand. And the court instructed the jury that they must come to a definite and certain conclusion as to this contract.

If there was no contract proven, then they must find for plaintiffs, because the complaint in fact was not denied. The burden was nowhere put upon the plaintiffs to disprove the contract defendants had alleged in their answer.

As to the seventh and eighth instructions there certainly was no error. Under the issues, here was a contract set forth in which it was claimed that all of the plaintiffs promised to do a certain thing, namely, deliver to defendants all the meat they shipped to Butte. Now, if one of the plaintiffs, on his own account, and for his own use and benefit, shipped meat there which he did not deliver to defendants, certainly this was no violation of defendants' contract. When several parties associated together, in their associate capacity agree to do a thing, can it be possible that all will be liable because one in his individual capacity does not do it? The appellants have found no authority to sustain this view. I cannot think there is any. Parties are bound only by the contract they make. If this was a several contract, and bound each in his separate capacity, then Bass alone would be the one liable for the breach of the contract. Plaintiffs did not undertake that Bass should not do the thing, but that they would not do it.

As to the fifth instruction, which by accident was not taken out by the jury, there is this to be said: Undoubtedly the instruction was read to the jury. Then the instruction is not true as a matter of fact. The answer of defendants bears certainly a different construction from that recited in the instruction. When a court undertakes to state the issues in the pleadings, he should state them correctly.

Pleadings are certainly, if not construed most strongly

against the pleader, to be construed according to the natural import of the language used.

Again. There was not, and is not, in the record one particle of evidence that would go to show that this was the meat of plaintiffs and not the meat of Bass. If the jury had so found, the finding would have been in the face of all of the evidence. A court should not give an instruction not founded upon the evidence. *Trustees of Iowa College v. Hill*, 12 Iowa, 508; *United States v. Gottlieb Britting*, 20 How. (U. S.) 252; *Michigan Bank v. Eldred*, 9 Wall. 553-4.

Taking all the facts about this instruction, and the defendants could not have been prejudiced by the jury not taking it to their room. The verdict was not against the law of the fourth instruction of defendants. There was evidence by Bonner going to show that he did not consider he had made a special contract except as to the meat first sold; as to the balance, defendants could take it or not; they could deliver it to defendants or not.

But if the evidence was of a special contract, that was not such a variance as would justify the jury in finding for the defendants.

Again. The facts set forth in the complaint were admitted as true. The first denial is of indebtedness, which is not good. 35 Cal. 459, 460; *Wells v. McPike*, 21 Cal. 218. Denials, except as hereinafter set forth, not good. *Levensen v. Schwartz*, 22 Cal. 230; *Richardson v. Smith*, 29 Cal. 530; Pomeroy's Remedial Rights, 633.

The whole issue was tried as to whether the contract as set forth in the answer was true. If there was a special contract, plaintiffs had a right to disregard it, as defendants had not complied with it; and suit on an implied contract was proper, and it was proper to introduce evidence of original contract. *Reynolds v. Walker*, 6 Cal. 108; *Hosley v. Black*, 28 N. Y. 443; Moak's Van Santvoord's Pl. 171.

Again. This could have been nothing more than a



variance; no injustice was done, and it should have been disregarded. Statutes of Montana of 1879, secs. 110, 111 (1st division).

The court, I think, will fail to find any verdict in this transcript.

Motion for a new trial is generally made with the view of setting aside a verdict.

CONGER, J. This action is brought to recover a claim of \$356.36, being the balance of an account for goods, wares and merchandise, to wit, bacon, hams, shoulders and lard, sold and delivered by plaintiff to defendants, at their special instance and request, between the 1st day of December, 1879, and the 1st day of June, 1880; that said amount is now due and unpaid, etc.

Defendants, answering, deny all the allegations of the complaint and set up a counterclaim, to which plaintiff replies.

In the course of the trial, Sylvan Hughes, witness for defendants, testified as follows:

"I was present when Bonner and Foster made the contract as to the bacon for which this suit was brought. Bonner said they had a large lot of bacon, hams, lard, etc., in Missoula county for the Butte market, and wanted to put it all in our house so as not to come in competition. We proposed to sell meat all around for fifteen cents per pound, and to continue to deliver as long as he delivered at the Butte market. Foster said, when the states bacon arrived he might have a lot on hand and could not compete with bacon from the states. Bonner said as soon as states meat arrived, whatever defendants had on hand was to be weighed up and settled for at price of states bacon, and thereafter all delivered should be at prices which it cost to lay states bacon down. The lard was to be at sixteen cents per pound.

"Bonner said that no meat should come from Missoula but his. They had control of all of it. They were not

bound to deliver bacon after states bacon came in, but if they did, Foster & Co. were to have it. The greater portion of the lard came in forty-pound cans. There was a difference in the market of four cents per pound between forty-pound cans and cans from three to twenty pounds. There were fully two thousand pounds of lard in cans over twenty pounds. About the 13th of June, Mr. Bass, one of the plaintiffs, came to Butte with what he said was eleven thousand to fourteen thousand five hundred pounds of bacon, which he sold to others than Foster & Co. He said he had bought out the others and was on his own hook and would not deliver to defendants at price of states bacon. The market price was about seventeen cents.

“Bonner guarantied that no other Bitter Root bacon should come in. This contract covered the entire season of 1880 up to July. Bass said he had bought Bonner & Co. out, and could not stand states prices. It cost eleven cents per pound to lay states bacon down in Butte. Bonner guarantied for season of 1880. Foster was to take all they delivered. What came to Butte market was to go to Foster & Co. Bonner said they had all the meat from Missoula county for sale. What induced Foster to pay such a high price for it was that no one else should sell Bitter Root bacon in Butte. Foster had states bacon when Bass brought that bacon on the 14th of June.”

After the introduction of this evidence, plaintiff moved to strike out a portion thereof as not warranted by the pleadings. Defendants then offered to amend their answer to make it conform with said evidence, and offered the following amendment, to wit, to be inserted after the word “lard” in line 4, page 4, in amended answer: “That by the terms of said contract, said plaintiffs guarantied and promised defendants that no other parties should take any bacon, hams or shoulders to said Butte market from said Missoula county, of the

hams, bacon and shoulders of, and then ordered or put up and cured by, said plaintiffs, or said plaintiff Bass, except to defendants; but in violation of said agreement, one of said plaintiffs, said W. E. Bass, took of bacon, hams and shoulders so put up and cured by said plaintiffs, about eleven thousand pounds thereof, and sold the same to other parties in said market than defendants, to the defendants' damage in the sum of \$400. Wherefore defendants pray judgment as prayed in their answer."

In defendants' answer there is this allegation: "Plaintiffs agreed with defendants to sell and deliver all bacon, hams, shoulders and lard, put up at their said packing house, which was intended by them for the said Butte city market, or that they should thereafter deliver in the said town of Butte to defendants, at their, defendants', store in said Butte City, upon the terms and conditions hereafter set out. That said plaintiffs, as an inducement to make and enter into said contract, represented that they had a large amount of such bacon, etc., to sell in Butte City, and, if defendants would agree to purchase all of it that plaintiffs might deliver in said Butte, upon the prices and terms stated, the defendants should have the entire lot. The defendants, relying upon these representations, were induced to and did buy all of said bacon, etc., and plaintiffs agreed to deliver the same to defendants at the following prices."

The answer further states "that plaintiffs, disregarding their said agreement, did deliver and sell to others than defendants a large amount of bacon, etc., thirteen thousand pounds, to defendants' damage," etc.

These are, in substance, the same as the amendment offered by defendants to their answer. In the amendment it is said plaintiffs "guarantied and promised."

There is not such a material difference between the answer and the amendment as to make it error for the court, in its discretion, to refuse the motion.

The testimony could as well have been introduced,



and was introduced, under the answer without amendment.

Under the pleadings the evidence was competent and material to the issues, and it was error to withdraw it from the jury.

It appears that by a mistake one of the instructions which the court had given to the jury was not by them received. This instruction was material to the law of the case, and, as it was intended by the court, should have gone to the jury.

The court may, in its discretion, withhold all of the instructions from the jury, or may allow them all to be taken by the jury; but it will not do to say that it can separate them, and give part and retain part.

It is true this happened by accident, but the law is the same.

Judgment is reversed, and the cause remanded for a new trial.

*Judgment reversed.*

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KENNON, respondent, v. GILMER ET AL., appellants.

PLEADING.— In an action for damages for injuries received, when the complaint shows that the proximate cause of the injury was plaintiff's own act, it further devolves upon him to allege and prove that in thus acting he exercised that degree of care and prudence that a reasonable person would have used in like circumstances.

JURY — *Right to a full and lawful panel at the commencement of trial.*— Every litigant has the right to have a full and lawful panel before him at the commencement of a trial from which first to select a jury. If, between the time of selecting the panel and the commencement of the trial, the law should be changed so as to require a larger panel, the litigant has the right to demand the larger panel.

*Appeal from Second District, Deer Lodge County.*

S. DE WOLFE, for appellants.

Appeal from the second district court of Deer Lodge county from a judgment in favor of plaintiff (respondent

in this court) for the sum of \$17,167, damages, and costs taxed at \$341.75.

The action was for injuries received by plaintiff while a passenger on defendants' coach, on the 30th of June, 1879, between the towns of Deer Lodge and Helena. The answer denies negligence on the part of defendants, and alleges contributory neglect on the part of plaintiff as the direct cause of the injury. See Answer, Transcript, pp. 10, 11.

Defendants filed a general demurrer to the amended complaint, which was overruled by the court. Transcript, pp. 7, 9. This is the first error alleged.

The amended complaint alleges that the coach in which plaintiff was being conveyed as a passenger was, by the fault and neglect of the defendants, placed in a condition so as to "imperil the safety of plaintiff" and "to render it apparently unsafe for plaintiff to longer remain on said coach; that, being actuated by great fear of bodily injury by longer remaining thereon," he jumped, and thereby received the injury complained of. Transcript, pp. 2, 7.

The first of these allegations is that the coach was placed in a position so as to "imperil the safety" of plaintiff; and the second, which is clearly an allegation in the alternative (although not such in form), is that the coach was placed in a position to "apparently" render it unsafe for the plaintiff to remain longer in the coach, and in fear of danger he jumped, etc.

The rule is that pleadings shall be construed most strongly against the pleader, and if we accept the second of these allegations as the true one, the coach was not in a position to actually imperil the plaintiff, but he thought it was, and therefore jumped, and was injured. As the injury resulted from the jumping, and not from the accident to the stage, it was incumbent on the plaintiff first to allege and then prove that he was in the exercise of ordinary and proper prudence in jumping, and

was thus free from any contributory negligence. This he has not done, and the complaint in this respect is deficient, and does not state facts sufficient to constitute a cause of action, and was for this cause subject to demurrer. The authorities are by no means uniform as to the proof of contributory negligence, and it is impossible to harmonize them.

Shearman & Redfield, in their work on Negligence (3d ed.), in section 43, and in the appendix to the section, have collated the cases and shown their conflict. In this condition of the authorities this court is free to act upon the weight of authority, or the reasons which support them.

Generally the proof of the injury furnishes the proof or raises a strong presumption of negligence on the part of the carriers. As in cases where the stage or vehicle in which the passenger is being conveyed is overturned, or cars run off, or are thrown from the track, in these and all similar cases the accident to the conveyance is what injures the passenger, and the condition of the vehicle, coupled with the injury, raises a presumption of negligence on the part of the carrier which he must rebut or disprove, otherwise he will be chargeable.

But not every accident raises such a presumption; and when, as in the present case, the passenger is injured by the act of jumping, no presumption of negligence on the part of the carrier arises from the accident itself, and the party claiming damages should both allege and prove that the injuries complained of did not result from neglect or the omission of proper caution on his part. In other words, as stated in the books, that he was not guilty of contributory negligence. 12 N. Y. 236; 18 N. Y. 248; *id.* 540; 20 N. Y. 65; 24 N. Y. 430; 12 Pick. 177; 21 Pick. 146; 101 Mass. 455; *Shear. & Red. on Neg. secs.* 34, 281; 22 Barb. 574; 29 Barb. 234; 21 Barb. 339; 33 Barb. 414; *Wait's Act. & Def.* vol. 2, p. 90, and cases cited; 49 Cal. 253; *Thompson, Car. of Passengers*, p. 214.



II. The court erred in overruling defendants' challenge to the jury. Transcript, pp. 42, 47.

The trial jury summoned for the February term, 1881, were summoned, it is presumed, in accordance with the requirements of section 773 of the fifth division of the Revised Statutes, which required the county commissioners, twenty days before the commencement of a term of the district court, to draw eighteen names from the list of one hundred persons previously selected; and the eighteen persons so drawn, the statute says, shall be summoned as trial jurors for the next ensuing term of the district court.

By an act of the territorial legislature, approved February 23, 1881, the number of trial jurors to be thus summoned was increased from eighteen to thirty, and section 2 of the latter act provides that of the thirty jurors so summoned they should be excused for cause or by lot until the number was reduced to twenty-four, and the latter number should at all times be kept full, and should constitute the trial jury for the term. The act is explicit in requiring the clerk of the court, under the direction of the court, to draw from the box furnished by the county commissioners so many additional names as the court shall direct, to fill the panel, who shall be summoned in like manner as the original panel. This law was in full force on the 24th day of February, 1881, and also on the 28th day of February, 1881, when the order was made for drawing additional trial jurors, found on pp. 16 and 17 of the transcript.

Without the passage of the act of 1881, the mode of drawing these additional jurors was clearly unauthorized. Section 777 of the fifth division of the Revised Statutes clearly points out the mode of obtaining additional trial jurors when they become "necessary." These directions were not observed by the court, but it evidently proceeded, or attempted to proceed, under section 779; but this section was not intended to supersede sec-

tion 777, but provided a mode of obtaining grand or trial jurors when there had been a failure to obtain them under sections 773 and 777. The language used in section 779 is, "when there is not a sufficient number present, or those summoned have been discharged, it shall be lawful," etc. It is a familiar principle, that effect must, if possible, be given to all parts of a statute; and it is plain, on reading sections 777 and 779 together, that the law in the first instance required additional jurors to be drawn from the box containing the list of names prepared by the county commissioners, and resort was afterwards to be had to the mode pointed out in section 779 when they failed to attend or were discharged. A different construction would render section 777 obsolete. Code, section 246. This section requires additional jurors when required to be drawn from the box prepared by the county commissioners.

Sections 773 to 779 was the act approved January 12, 1872, and cannot be reconciled with section 246 of the code, which was not passed until 1877. The latter act repeals the former if both cannot stand.

But the entire method of completing the panel, as well as the number composing it, was changed by the act of February 23, 1881, which was in force at the time, and the mode of drawing additional jurymen adopted by the court was utterly at variance with its requirements.

A requisite number of persons having the qualifications of jurors will not constitute a jury, or panel of jurors, unless they are drawn and summoned as jurors in conformity with law. *Lincoln v. Stowell*, 73 Ill. 246; 3 Blackf. 37; id. 258; 13 Wall. 434.

III. Defendant excepted to the sixth, eighth, ninth and twelfth instructions given by the court to the jury at the instance of the plaintiff.

Waiving in argument any objection to these instructions, excepting the ninth only, that instruction is clearly erroneous and misleading, in telling the jury that

in assessing the damages of plaintiff they may "take into consideration his mental and bodily pain and suffering from the time of the injury to the present time, and what it is likely to be in future."

The authorities are not in harmony on the question as to whether mental suffering is an element of damages when considered separate and apart from physical suffering arising from injury. Mr. Greenleaf holds that it is not, except in cases of wilful injury. 2 Greenl. Ev. sec. 267; *Johnson v. Wells, Fargo & Co.* 6 Nev. 226; *Quigley v. C. P. R. R.* 11 Nev. 369.

In the latter case, which was an action for being wrongly ejected from defendant's car, the court drew a distinction between actions of that kind, which proceed from malice or wilfulness, and actions arising from injuries caused by negligence only, and holds that in the former damages may be recovered for mental suffering, while in the latter they cannot; and this appears a just distinction.

Whatever the law may be as to this point, it is clear that that part of the instruction which authorized the the jury in estimating damages to take into consideration what the mental and bodily sufferings of the plaintiff were "likely to be in future" was clearly erroneous.

Damages, like other facts in a case, must be proven in order to authorize a verdict, while this instruction substitutes for proof the speculative or conjectural opinions of the jury themselves. Such a method of estimating damages is alike contrary to reason and to the nature of judicial proceedings, which requires evidence to support verdicts, and verdicts to be based on evidence. We are not without authority, as this very point underwent decision in the case already cited of *Curtis v. Rochester R. R.* 18 N. Y. 542.

There was no evidence whatever offered on the part of plaintiff as to either mental or physical suffering in the future. This instruction to the jury, therefore, left them



entirely free to speculate as to what these sufferings might be. Mr. Kennon, on his examination, testified that he had suffered in mind more than he had physically, and for aught this court can tell, the jury, in estimating damages, may have considered that the mental suffering in the future would also be greater, and this may have had weight in determining the amount of the verdict. 17 Cal. 39; 42 id. 409; 50 id. 630; 51 id. 223; in which cases it was held that injury would be presumed in case of error, unless the record showed the contrary; here it does not. Graham & W. on New Trials, 708.

IV. The court erred in overruling defendants' motion for a new trial on the grounds of excessive damages, and because the verdict was against the evidence. No exact rule for the measurement of damages can be established, owing to the very nature of jury trials, and the different estimates which different men will place on the same injuries. But when the verdicts are excessive courts have not hesitated to set them aside and submit the cause to another jury. Courts often do this while declaring that it is the special province of the jury to assess the damages, and the legislature evidently deemed the power to set aside verdicts as useful, otherwise they would not have conferred the power on the courts.

Many of the cases under this head are collected and commented on in the decision of *Collins v. R. R.* 12 Barb. 492, and in 19 Barb. 461. In *Boyce v. Cal. Stage Co.* 25 Cal. 460, the injuries to plaintiff were as severe as they could be, and the plaintiff survive. They were also of a permanent kind, and rendered plaintiff unable to make a livelihood by any kind of labor. The damages awarded in that case were \$16,500, which the court refused to set aside as excessive. In this case, for a less injury, the jury have awarded heavier damages. No amount of damages would or could be a recompense for the loss of a limb, and the suffering and inconvenience arising therefrom. And it is not on this theory that the

law acts in awarding damages to the injured party in a case of negligence, but it is to award such compensatory sum as will reimburse the person injured for the expenses and suffering incurred by the injury. Beyond this the law cannot go, if it should take the entire estate of the person causing the injury and give it to the person injured.

V. The motion for a new trial on the grounds that the evidence was insufficient to justify the verdict is also one which addresses itself to the sound discretion of the court before whom the cause was tried, and appellate courts are loth to interfere with the decision of the lower courts on points of this kind. Still, if there has been an abuse of discretion, appellate courts will reverse the court below as well on this as other errors. The rule of the court in reversing motions of this kind, and the reasons therefor, are fully stated in 23 Cal. 243; 46 Cal. 585; *id.* 576; 37 Cal. 40; 50 Cal. 166; 33 Cal. 525. In the last case the court, quoting with approval from Graham & Waterman on New Trials, says, "that if the judge believes that the verdict is against the truth of the case, *i. e.*, is contrary to the weight of the evidence, he should grant a new trial, otherwise the power of courts over verdicts is a mockery and a delusion." 49 Barb. 583.

It would be, perhaps, an unwarranted assertion to say that there is no evidence whatever in this case tending to support the verdict, but the record amply supports the statement that the vast weight and preponderance of the evidence introduced by the plaintiff, as well as by the defendants, disproves any negligence on the part of the defendants. And this weight and preponderance in the evidence is still strengthened when the situation of the witnesses, their pursuits and means of knowledge of the facts testified to, are considered. See testimony of Marion, Spear, Forbis, Mitchell and McCormick as to the condition of the driver during the trip, and compare with it the statement of Mrs. Millie Goodell, that Mantle was

“so drunk when he came to the station on the day of the accident that he could hardly sit on the seat.” Compare, also, the statements of both the Mesdames Goodell in regard to the team with that of Mr. Riddle, Mr. Watson and others who were well acquainted with the horses and had driven and handled them for years, whereas both of these ladies testify that they never rode after the team. These ladies are also contradicted by all the other witnesses, both for plaintiff and defendants, as to the horses that were in the team on the day of the accident, and of the position they occupied. In some of their statements they must have been mistaken, and this serves to throw doubt over their entire testimony, particularly so when they are contradicted by other witnesses with better means of knowledge. Aside from the testimony of these two ladies, there was no evidence of negligence on the part of defendants, or any insufficiency in the means employed by them.

And it is submitted that from the great weight and preponderance of the evidence the court erred in overruling defendants’ motion for a new trial on that ground.

THOS. L. NAPTON and J. C. ROBINSON, for respondent.

Brief and points made by Thomas L. Napton, of counsel for respondent:

1. The proposition as error first presented by appellants’ attorney for the consideration of this court is, in brief, that the complaint does not state a cause of action against defendants.

It is not necessary, in an action for personal injuries received, for the plaintiff to negative the idea of his contributing to the injury received in his complaint. It devolves upon the defendants to show contributory negligence before the rights of plaintiff can be defeated. See *Higley v. Gilmer et al.* 3 Mont. 90, and cases there cited; 22 Am. Rep. 714; 41 Wis. 105.

Admitting, for the sake of argument, that this had



not been done, the court, by examination of the complaint, on pages 3 and 4 of the transcript, will see that the allegations of the complaint are in the conjunctive form, and completely negative any idea of contributory negligence; and the defendants' counsel evidently thought so and believed so, and acted upon that theory, or they would not have charged contributory negligence in the answer, but would have relied upon denials of the allegations in the complaint. See p. 11 of transcript, subdivision 4 of answer.

According to the rules of pleading, the plaintiff should allege that the defendants were common carriers; that he was a passenger; that the defendants had injured him; the extent of the injury and the extent of the damages. Then the defendants could admit, as in this case they have done, that they were carriers; that the plaintiff received the injury complained of while a passenger, or deny that his life was so "imperiled and endangered" as to compel him to jump from the coach, and that he received the injury from said act.

Further. This court will presume that the defendants had a fair trial and a just verdict and judgment, even though the complaint should be thought defective, and even though it does not state a cause of action, for the reason that if a party go to trial on defective pleadings, tries his case and saves no exception to the pleadings, the court will presume that what was missing in the pleadings was supplied by the evidence without objection; and in this case we have none to review except to an instruction and challenge to the panel of jurors. See *Hershfield v. Aiken*, 3 Mont. 442, and cases there cited.

The error complained of does not affect the substantial rights of the parties, though excepted to, and in this case there is no exception. We have no evidence to review; and if, under any circumstances, the court could enter the judgment it did below, every presump-

tion is in its favor, and the judgment should not be reversed.

The jury found their verdict for plaintiff and assessed his damages. There is every presumption that the verdict was right, as both the judge presiding and the jury agreed.

2. The second objection as error, urged by appellants, is that the jurors were not drawn from the box according to *law*, and their counsel therefore challenged the panel. In reply I would say that, in our civil practice, and in the selection of jurors, no challenge to the panel is allowed, but is prohibited according to the maxim, *Expressio unius exclusio alterius*. *Territory v. Deegan*, 3 Mont. 383; *Dudley v. Mayhew*, 3 N. Y. 9.

The statute says, in sections 248-249 of the Civil Practice Act, that challenges shall be for the following causes, and then enumerates them.

There is certainly no constitutional or organic law providing for the *manner* of selecting jurors, or the right of challenge to an individual juror, except that in criminal cases the defendant is entitled to his peers and those who are not prejudiced against him. Section 248, *supra*, provides in express terms that "the challenge shall be to individual jurors, and shall be either peremptory or for cause;" and then section 249 enumerates the causes. This has not been done in this case by counsel for defendants.

Admit that the challenge was good to the panel, the exception does not state wherein the jury was illegally drawn, nor specify in what consisted the illegality of the jury. Nor does the record show defendants had to exhaust any peremptory challenge upon any of said jurors; nor does the record show that any of said jurors so challenged brought in the verdict in this cause; nor does it show under what law the jurors for the term were drawn. They must be selected by the county commissioners, at least twenty days before the term, and they may have

been selected thirty days before the term; and the last act of the legislature had not gone into effect for at least four days after its passage, and these jurors must have been selected before its passage and approval. Without this construction there could have been no jury for the term of court at which this cause was tried. For this purpose, as to when this law went into effect at Deer Lodge, the court will take judicial notice of the distance to said place.

As to effect of no peremptory challenge being made, see *Taylor v. Western R. R. Co.* 45 Cal. 329.

The third error claimed by defendants' counsel is that the court erred in giving instruction No. 9 at the request of respondent, the exception to Nos. 6, 8 and 12 being waived. If this instruction would be good under any state of facts that could possibly arise from the pleadings in this case, the court will not reverse the case.

We are satisfied that the instruction is correct because it provides a mode and rule by which the jury could justly compensate the plaintiff for the injuries to his mind and body, as charged in the complaint.

It seems to me that it is "a distinction without a difference," in a case of this kind, to attempt to separate the bodily and mental suffering of the party injured. But even that has not been done in the instruction No. 9 given by the court and assigned as error. In this instruction the court uses this language as to general damages: "*Assess the same in such sum as will compensate him for the injury received. And in so doing may take into consideration his mental and bodily pain and suffering from the time of the injury to the present time, and what it is likely to be in the future; the inconvenience to him by being deprived of his leg and loss of time, and inconvenience attending to business generally.*"

To analyze the instruction, it means that the jury should compensate for the injury up to the date of trial, and then estimate as to what it would be in the future.



They could not say what it would actually be, because they cannot predetermine how long a man or the plaintiff may live. But they may *estimate*, as stated in the instruction, what it will *likely be*. This is as near correct as human judgment can go towards the future.

Let us suppose that the plaintiff sat before the jury, his leg having been amputated; suppose he had to hobble into the witness stand on crutches; suppose that he stated that he had been injured a year or more before that date, and that the splinters of bones from his wound were continually obtruding and passing through the flesh, and that the wound had not healed and probably never would, as appeared from his statement and the appearance of the limb itself. Could not a jury as easily estimate his future damages as his past? The only difference would be that the jury could not tell how long the party would live. They can *only estimate* and not arithmetize. The main objection, therefore, being on account of the want of evidence to support the instruction, the error assigned must fail of its mark, because we have no evidence, in the language of the statute, to "explain the instruction" or to show its applicability.

The authorities are uniform that this instruction is correct, when the damage to mind and body are united or estimated together. See *Giblin v. McIntyre*, 2 Utah, 386, in which the instruction in this case was given nearly in the same language and with the same scale to weigh the damages. This case was appealed to the supreme court of the United States, and affirmed, as I am informed, though not yet reported. *R. R. Co. v. Arms*, 1 Otto, 495; *Penn. & Ohio Canal Co. v. Graham*, 63 Pa. 290; 3 Am. Rep. 549; *Jacob Kann v. Stark*, 1 Saw. (U. S. C. C.) 547; *Seeger v. —*, 22 Conn. 298, approved in 27 Conn. 293; *Ill. Cent. R. R. Co. v. Bowen*, 5 Wall. (U. S.) 90; Sedgwick on the Meas. of Damages, sec. 648, note 2; Redfield on Railways, 576; Shearman & Redf. on Negligence, secs. 662, 663, 606; *Peck v. Niel*, 3

McLean, 22; *Williamson v. Western Stage Co.* 24 Iowa, 171; *Higley v. Gilmer et al.* 3 Mont. 90; 27 Am. Rep. 215; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224.

This court cannot tell but that the injury was wilful and malicious, and that evidence of that character was admitted without objection.

The replication charges such to be the case, when the defendants seek to shelter themselves under the plea, "I could not help it."

#### APPELLANTS' BRIEF IN REPLY.

Sections 248 and 249 of the Civil Practice Act relate to challenges to individual jurors, and do not take away or affect the right of challenge to the panel, as was done in this case. The doctrine of "*Expressio unius exclusio alterius*" has no application. 13 Wall. 434. None of the causes for challenge mentioned under the different subdivisions of section 249 relate in any way to the mode of drawing, summoning and impaneling the jury, but all relate to the qualifications of the individual juror as to bias, etc. The challenge in this case was to the panel, as not having been drawn and impaneled in obedience to law. Record, p. 000.

If the statutory requirement contained in section 246 of the Civil Practice act, or the same section as amended in 1881 (Session Laws, p. 58, sec. 2), is not followed by the court or officers charged with the duty of selecting jurors, there is no other mode of reaching the error but by challenge. Whether section 246 was in force at the time of the amendment of 1881 is immaterial, as neither was acted on by the court in selecting the jurors under venires 2 and 3.

The case of *Taylor v. Western R. R. Co.* 45 Cal. 329, cited by respondents, only decides that a party is not obliged to challenge peremptorily with a less number than twelve jurymen in the box. Upon the correctness of the ninth instruction given for plaintiff, the supposi-

tion propounded by respondents does not cure it, if it is erroneous. It of necessity left the jury to guess or speculate as to what the injury "was likely to be in future," instead of confining them to such damages as were actually proven. It substituted the opinions of jurors for proofs.

The case of *Milwaukee R. R. Co. v. Arms*, 1 Otto, 489, only decides that exemplary damages may be awarded when the carrier is guilty of wilful misconduct or reckless indifference, causing injury; that the case before the court was not one of that kind, and for this reason the cause was reversed on account of an erroneous instruction authorizing the jury to award exemplary damages. The case, if it has any bearing, is an authority in favor of appellants, rather than respondents.

The case in 1 Sawyer, 588, was a case growing out of the infringement of a patent right, and cannot possibly have any bearing on the case at bar; besides it does not instruct the jury that in arriving at a verdict they may estimate what the future damages are "likely to be."

The same is true of the case in 63 Penn. 299.

The cases cited from 22d and 27th Connecticut were cases against towns for injuries received from falling bridges. They decide that juries, in estimating damages, may take into consideration the mental and physical suffering of the plaintiff, but do not hold that they may speculate as to future suffering, or award damages for suffering "likely" to be endured but not proved.

The case in 5 Wall. 90, was an action brought by an administrator for an intestate killed by an accident. It was under a statute which fixed a minimum amount which the jury could award in cases of that kind, and Justice Nelson, speaking for the court, says there is no fixed rule for computing damages in case of personal injuries, but it must be left largely to the discretion of the jury. This does not militate against the proposition that the ninth instruction, as to future damages, was wrong.



The case in 3 McLean, 22, decides that where great recklessness was shown on the part of the carrier or his agent causing the injury, the jury might award exemplary damages.

In the case in 24 Iowa, 172, the court held that exemplary damages might be awarded when the evidence showed fraud, malice, gross negligence or oppression on the part of defendant.

The case in 6 Nev. 225, also cited in appellants' brief, holds that pain of mind is not an element of damage, considered as distinct from bodily suffering, and says nothing in regard to future suffering, either mental or bodily.

The case of *Higley v. Gilmer*, 3 Mont. 90, is to the same effect. In this case the court expressly instructed the jury that, there being no evidence of wilful injury or recklessness, they could not award exemplary or punitive damages. See — instruction.

The ninth instruction was the only instruction which the court gave in regard to damages for future suffering, and, whether the remaining instructions were right or wrong, they did not correct the effect of that instruction, if it was erroneous.

#### REPLY TO ROBINSON'S BRIEF.

The case of *The People v. Welch*, 49 Cal. 174, arose on the construction of a statute, and holds that when the court improperly directed the coroner to serve a special venire, the defendant could not take advantage of it by a challenge to the panel.

The case in 6th Wisconsin only holds that, when one of the jurors summoned was on the previous jury, it was not ground of challenge to the array.

The case in 35 N. Y. 129, is an authority for the appellant rather than respondent. In that case the court say: "The officers whose duty it was to attend the drawing (for the jury) were clearly guilty of gross neglect of duty,

and doubtless are liable to punishment therefor. The question still arises whether any injury has resulted to the prisoner or he has been prejudiced thereby. If we could see that by any possibility this neglect of duty on the part of these officers could have changed the panel, or in any manner have produced any different result, we might hesitate whether the prisoner should not have a new trial. It is apparent from the statute that the officers enumerated were but silent spectators to the drawing of the names from the jury box; *their presence, therefore, would not and could not have changed a name drawn.* And their authentication of the drawing, although required by the statute, is of but little moment if the names actually drawn were then returned on the panel." Vol. 35, p. 129.

The case at bar is very different. Here the judge and sheriff of the county made up a list of the names contained in venires Nos. 2 and 3; they were not spectators merely of the drawing, like the officers mentioned in the New York case, but it was to their agency and acts that the list of persons mentioned in those two venires were drawn and summoned as jurors. And it cannot be said of the list of persons selected by them, that they were the same persons who would have been drawn and summoned had the clerk of the court resorted to the box prepared by the county commissioners, as required by section 2 of the act of February 23, 1881, or, if that act was not at the time in force, then as required by section 264 of the Code of Civil Procedure.

In the New York case, the jury drawn and summoned was the same that it would have been if the officers mentioned had done their duty and witnessed the drawing; in the present case the presumption is that they were different. The remark of the New York court, therefore, that they would hesitate about granting a new trial if they could see that the result would have been different if those officers had been present and done their duty,

has special application and force to this case, and is a direct authority in our favor.

The proposition that the drawing and impaneling of jurors is regulated by statute is conceded; but it does not follow if the statute in this respect is disregarded or overlooked, that persons affected thereby are without remedy. And a challenge to the panel is not taken away because challenge for cause or peremptorily to individual jurors is given.

The cases in 46 and 49 California were challenges to the grand jury, made under a special statute, and do not apply.

The two cases cited in 13 Wall. 290, and 13 Nev. 139, only decide that a verdict should not be set aside simply because some expressions of the court in its charge to the jury might, in some particulars, when considered apart by themselves, be susceptible of verbal criticism, which, when taken and considered with other portions of the charge, could not have misled the jury.

The objections to the ninth instruction given by the court at the instance of plaintiff is not to its verbiage, but its substance. The substance of the charge is that the jury may award damages for such future pain and inconvenience as the plaintiff is "likely" to suffer from his injuries — not what it has been proven he must suffer. In other words, it substitutes conjecture for proof, and no other part of the charge given counteracts the effect of that instruction; and the jury in arriving at the large verdict they did, it is fair to presume, awarded damages for future as well as past suffering.

The case of *Curtis v. Rochester R. R.* 18 N. Y. 542, is directly in point as to the error of such an instruction.

CONGER, J. This is an appeal from the second judicial district, Deer Lodge county, Montana territory. The action was for injuries received by the plaintiff while a passenger on defendants' coach, on the 30th of June, 1879,



between the towns of Deer Lodge and Helena, and plaintiff recovered a judgment of \$17,167 and costs of suit.

From this judgment the defendants bring their appeal to the supreme court and assign as error: First. That the court erred in overruling their demurrer to plaintiff's amended complaint. Second. That the panel for the jury was not drawn in accordance with the law. Third. Exceptions to instructions. Fourth. Excessive damages; and fifth. That the evidence was insufficient to justify the verdict.

With regard to the fourth and fifth assignments of error, they were eliminated from the cause by the order of this court, made at the August term, when the court by order struck out from the statement the evidence therein contained, and are, therefore, not considered in this opinion.

Referring to the assignments of error in their order, there is, first, the demurrer of defendants to plaintiff's amended complaint, which was general — that the complaint did not state facts sufficient to constitute a cause of action.

The complaint sets out that the defendants were common carriers of passengers for hire from Deer Lodge to Helena; that on the 30th day of June, 1879, plaintiff took passage on one of defendants' coaches and prepaid his fare; that while he was in transit the said coach was, by and through and by reason of the negligence and carelessness and mismanagement of said defendants and their servants, and by reason of the failure of defendants to provide suitable, safe and gentle horses, and a suitable and competent driver for the horses, so that the horses to said coach becoming unmanageable, and one of the same jumping and throwing itself on the pole of the coach, thereby breaking the same, thrown and placed in such a condition as to imperil the safety of plaintiff.

So far the complaint sets forth a state of facts upon which the plaintiff could have relied if the injury com-

plained of had happened. But it will be observed that this was not the case. The complaint continues: "And to render it apparently unsafe for plaintiff to longer remain on said coach; that he, being actuated by just fear of bodily injury by longer remaining thereon, jumped from said coach, and, in so doing, one of plaintiff's legs was fractured, bruised, broken," etc.

Thus the plaintiff declares that the proximate cause of the injury he sustained was his own action. In so far the complaint shows that the plaintiff contributed to the injury, and avers his reason for so doing—that it was apparently unsafe for him longer to remain on the coach; that he, being actuated by great fear of bodily injury by longer remaining thereon, "jumped from said coach," etc.

As the plaintiff has heretofore averred that the proximate cause of the injury he sustained was the result of his voluntary act in jumping from the coach, placing it on the ground of apparent danger, and actuated by his great fear of bodily danger, is he not also required to first state, and then prove, that in the doing of this he acted with a reasonable degree of care and prudence?

Without entering into the question whether the plaintiff shall, in the first instance, be required to allege that he did not contribute, by his own negligence, to the injury complained of, we find in this case that the proximate cause of injury was the act of complainant.

The question to be considered is, were the grounds of plaintiff's action as set forth in the complaint sufficient to warrant the act, viz., "apparent danger and great fear of bodily injury?" These are the conditions that present themselves to plaintiff's mind; but is the condition of plaintiff's mind to be taken as the true rule of action? Is it not rather the mental condition of a reasonable and prudent man in similar circumstances? We think this the true rule, and that plaintiff, having asserted that the proximate cause of his injury was from his own act, he should then be held to prove that in thus acting he did ex-

ercise that degree of care and prudence that a reasonable person would have done in like circumstances. This is nowhere stated in the complaint, and we are left to conjecture as to that important factor in the cause.

Generally the proof of the injury furnishes the proof or raises a strong presumption of negligence on the part of the carriers, as in cases where the stage or vehicle in which the passenger is being conveyed is overturned. But not every accident raises such a presumption; and when, as in the present case, the passenger is injured by his own act of jumping, no presumption of negligence arises from the accident itself.

This view of the law is set forth and referred to in 12 N. Y. 236; 18 N. Y. 248, 540; Shearman & Redfield on Negligence, sec. 43 and cases there cited; 33 Barb. 414; 49 Cal. 253.

The complaint did not state a cause of action, and defendants' demurrer thereto should have been sustained by the court.

The second ground of error relied on is the order of court overruling the defendants' challenge to the jury. The statement is as follows: After the jury which tried this cause had been called and examined on their *voir dire*, but before they were sworn to try the cause, the defendant interposed a challenge to the jury, which challenge was overruled by the court, and the jury thereupon sworn to try the cause. To the order of court overruling said challenge, the defendants, by their counsel, then and there excepted and filed their bill of exceptions, which was allowed by the court, and was as follows, to wit:

"Now come the defendants by their attorneys and make this their challenge to the jury now here impaneled to try this cause, and as grounds of challenge allege: 1st. That said jury was not drawn or summoned in accordance with law. 2d. That said jurors, and the different jurors composing it, have not been drawn, summoned or impaneled in obedience to law. 3d. Sets out that



some jurors which were drawn were excused by the court; but this is not insisted on by counsel, and is not considered by the court. 4th. That after the excusing of the jurors named, the judge of this court and sheriff of Deer Lodge county deposited certain names in a box for the purpose of drawing therefrom to complete the panel of the trial jury to serve at the present term of court, and the clerk of this court, on the 24th day of February, 1881, drew therefrom the names of certain persons (names omitted in this opinion), and on said day issued a *venire* under the seal of the court, being *venire* No. 2; and the persons named were afterwards, in pursuance of said *venire*, summoned as trial jurors, and now form a part of the regular panel of trial jurors of the present term of this court. 5th. That the persons so drawn, or summoned, were not drawn or summoned in pursuance of law, and are incompetent to act and serve as trial jurors in this cause."

. It is again alleged that on the 28th day of February, 1881, the judge of the court and sheriff of Deer Lodge county deposited certain other names in a box for the purpose of having the names so deposited, or a part of said names, drawn therefrom to complete the panel of said trial jurors; that the clerk issued a *venire* for some of them, and they were summoned and formed part of the panel; that on the 9th day of March, 1881, a jury to try this cause was drawn from a box containing the names of the jurors summoned under the *venire* mentioned; that at the time said box contained the names of only nineteen persons; that the said nineteen persons did not constitute a full and lawful panel of trial jurors for the said district court, said lawful panel requiring twenty-four persons, summoned in conformity to law, to constitute the full panel of trial jurors.

The following order of court was made and entered on the said 24th day of February, 1881: "It appearing to the court that the number of trial jurors in attendance is

insufficient for the transaction of the business thereof, and that a sufficient number of names cannot be drawn from the regular jury box containing the names selected according to law by the county commissioners to constitute a *venire*, without causing a great delay and expense in the service thereof: It is ordered that the regular jury box be set aside, and that twelve names of persons having the qualifications of trial jurors, to be selected by the judge of this court and the sheriff of Deer Lodge county, be placed in a special jury box, and ten names be drawn therefrom by the clerk in open court under the direction of the judge, and that a *venire* No. 2 issue therefor, returnable at two P. M., instant."

A similar order was entered on the 28th day of February, 1881, when other names were placed in a special box and drawn to complete the panel of trial jurors for the term.

The right to a trial by jury is an undisputed right, and in order that this right may be preserved to parties interested, it is a self-evident proposition that the law of their procurement must be observed. This form of trial is by the country, and those serving must be selected from the duly qualified citizens of the county. For this reason the county commissioners shall, at least twenty days prior to the commencement of any term of court, select the names of one hundred persons, lawfully qualified to serve as jurors, from the assessor's books, and the names so selected shall be placed in a box, from which they shall alternately draw the names of thirty persons, who shall be summoned, etc. See sec. 773 of fifth division, Revised Statutes.

At the commencement of any term, the judge shall examine the jurors who appear, and reduce the number to twenty-four, which in law is and is called the panel. The persons selecting the jurors are official, occupying an important and responsible office. They are selected and summoned before the term of court, whereby the

parties may have notice of the jurors, of their sufficiency or insufficiency, characters, connections and relations, that so they may be challenged upon just cause. Therefore any party to a suit has the right to have before him, from which to select a jury, a full and lawful panel, and in section 246, Revised Statutes, the manner of filling a panel, when a vacancy occurs, is laid down. But when by reason of challenge, in the selection of a jury for the trial of any cause, or by reason of the sudden sickness or absence of any juror for any cause, the regular panel shall be exhausted, the court may direct the sheriff to summon as many persons as may be necessary to complete the jury for the pending trial. But this is not intended to, nor does it, change the law or the right of a suitor to have a full and complete lawful panel from which to first select the jury.

It is true, the law in force at the time the county commissioners selected the trial jurors required them to select but eighteen. This they did; but at the time of the objection taken in this cause, the law was as heretofore stated.

It was the right of the parties at the commencement of the trial to have a full panel of twenty-four jurors from which to select a trial jury. This not having been done—the court and sheriff having selected names from which to draw a jury, and a lawful panel not being present,—it follows that it was error in the court to overrule appellant's challenge to the array. The cause is therefore reversed, and remanded for a new trial.

*Judgment reversed.*



## LOCKEY, appellant, v. HORSKY, respondent.

**PRACTICE** — *Evidence necessary to consider questions of granting non-suit and admitting improper testimony.*— Error in sustaining motion for non-suit cannot be considered in appellate court without the evidence upon which the judgment of the court below was based.

To determine whether the court below erred in admitting improper testimony, there should have been a motion for new trial, and a statement as provided by law.

**REAL ESTATE** — *Adverse possession — Right of recovery barred by statute of limitations.*— Where the findings of fact show that the defendant had been in actual possession, under claim of ownership of certain ground in controversy, having the same inclosed with a substantial fence, for more than eight years after plaintiff's right of action, if any, accrued, the latter's right of recovery is barred by the statute of limitations.

*Appeal from Third District, Lewis and Clarke County.*

M. BULLARD and SANDERS & CULLEN, for appellant.

1. The answer of defendant is ambiguous and uncertain in the particulars specified in plaintiff's demurrer thereto, and the demurrer should have been sustained.

2. The court erred in sustaining defendant's motion for a non-suit as to the first cause of action set up in plaintiff's complaint.

3. The court erred in permitting the defendant to read in evidence his deed to lot No. 15, in block No. 37. No part of said lot was in controversy, and defendant might as well have read in evidence a deed to any other lot in said block 37, or, for that matter, to any lot in the Helena town site, as the one which he did read. As far as the northerly ten feet of lot No. 14, which is the property in controversy, is concerned, it could make no more difference than who owned the property on the south side of said lot, or who the other adjoining owners were. What, under the pleadings, the defendant was called upon to show was, not that he was an owner of a lot adjoining, but that he had some sort of a paper title to the par-

ticular ground in controversy, upon which he could base his claim of adverse possession. While it is true that a possession of a part of a tract of land is sometimes construed to be possession of the entire tract, yet where the tract is divided into lots, possession of one lot is not deemed possession of any other lot or part of a lot for the purpose of forming a basis for the acquisition of a title to the same by adverse possession. See Code of C. P. sec. 33.

4. The fourth finding of fact made by the court shows that the holding of the northerly ten feet of lot 14 in block 37 by defendant was under and by virtue of the deed to his predecessors in interest to lot 15 in the same block. Defendant did not claim it as a portion of lot 14, but as a part of lot 15, and under the issues in this case such a holding or possession would be insufficient to predicate a claim of adverse possession upon. To render the possession of defendant adverse as to plaintiff, who is the holder of the legal title, and to rebut the presumption of law raised by such legal title, it is necessary, to set the statute of limitations in motion, that defendant should produce some conveyance to him or his predecessors in interest under which, in good faith, he can assert his belief that he had title to the identical premises in dispute. *McCracken v. City of San Francisco*, 16 Cal. 636. His possession can only be co-extensive with his deed. *Kile v. Tubbs*, 23 Cal. 437; *Elliott v. Pearl*, 10 Pet. 443; *Bair v. Gratz*, 4 Wheat. 222; *Kerne v. Cannovan*, 21 Cal. 299; *Garrison v. McGlockley*, 38 Cal. 79; Angell on Limitations, p. 378, § 384.

5. It is the *intention* to claim and hold adversely which, under the statutes of limitations, is effectual to create title by way of estoppel. If the defendant, as is evident by the fourth finding of the court, simply claimed lot numbered 15 under his deed, and did not intend to claim or hold any part of lot No. 14, then the fact that, through mistake as to where his line was, or otherwise,

he included within his inclosure the northerly ten feet of lot 14, being the premises in dispute, would be insufficient to render his possession adverse. Angell on Limitations, p. 389, and authorities there cited.

CHUMASERO & CHADWICK and E. W. & J. K. TOOLE, for respondent.

There is nothing in the first point of appellant. The answer was good. Appellant, in order to raise this proposition, if there was anything in it, should have stood upon his demurrer. Filing his replication and going to trial was a waiver of any cause of demurrer. *Gale v. Tuolumne W. Co.* 14 Cal. 28.

So far as the second and third propositions are concerned, they will not be considered on this appeal. There was no statement or motion for new trial. Hence there is nothing in the record to show any error by reason of granting a non-suit or the introduction of evidence. But the court will presume everything in favor of the judgment. The plaintiff claimed title through a deed from the probate judge. The findings of the court (which, under the record, cannot be disturbed) show that the plaintiff was never in possession, but, on the contrary, that the defendant (respondent) was in possession of the property in dispute long prior to and at the time plaintiff (appellant) received his deed from the probate judge. Having never been in possession, he must stand or fall upon his deed. Under the town site law, there was no authority in the probate judge to deed to one out of possession. Such a deed was void. *Treadway v. Wilder*, 8 Nev. 91; Town Site Law.

The lot of land claimed by respondent as No. 15 was inclosed with a good and sufficient fence before the town site was entered by the probate judge, and was actually occupied by the respondent and his grantors continuously from the time it was inclosed until the suit was commenced by appellant, and he had the right to a title for



the land so inclosed and occupied. See Town Site Act, R. S. sec. 1212.

Even if the lot had been vacant, the trustee of the town site had no right to make a deed to one not in possession of or without a right to the possession of the lot. Lockey never had possession or any right to the possession. Nor is any vacant lot subject to entry until having first been advertised and offered for sale at public vendue. The lot in dispute never was so advertised or offered. *Edwards v. Tracy*, 2 Mont. 48.

The findings also show that the respondent was in possession of the ten feet in dispute, under a deed from the probate judge for lot No. 15; that such possession was for a sufficient length of time to have acquired title by adverse possession, and that ever since his first possession he has had the same inclosed by a substantial fence, and had claimed the same for such period, exclusive of any other right, and all of this with the full knowledge of plaintiff (appellant). This invested defendant (respondent) with a title under the statute, which was of the same dignity and efficacy as a paper title. 2 Black (U. S.), 605.

The respondent believed that the land in dispute was a part of lot 15, and possessed it accordingly. Whether he was mistaken as to the boundary becomes immaterial. See Finding of Court; also *Grim v. Curley*, 43 Cal. 250; *Crory v. Goodman*, 22 N. Y. 170; *Enfield v. Day*, 7 N. H. 457; *Hale v. Gledde*, 10 N. H. 397; *McKenney v. Kenney*, 1 A. K. Marsh. 460; *Hunter v. Cressman*, 6 B. Mon. 463; *Sneed v. Osborne*, 25 Cal. 626.

When a person claims up to a given line, and occupies accordingly, the land so occupied will be deemed to have been held adversely. *Baldwin v. Brown*, 16 N. Y. 359; *Reed v. Farr*, 35 N. Y. 113; *Sneed v. Osborne*, 25 Cal. 619; *Pierson v. Washer*, 30 Barb. 81; *Burdell v. Burdell*, 11 Mass. 297.

Appellant's authorities are not in point. They apply to

cases of constructive possession. Appellant has not been injured. The issues of fact were found against him, and the conclusions of law found by the court necessarily followed.

CONGER, J. This is an appeal from the judgment of the court of the third judicial district, county of Lewis and Clarke.

The cause was tried by the court, a jury having been waived, and was for the possession of a certain piece or parcel of ground situate in the town of Helena, and described as ten feet front on Main street by one hundred and twenty-two feet deep, off the northerly side of lot No. 14, in block No. 37, of the town site of Helena, and for damages for withholding possession.

Upon the trial of the cause, the court found special findings of fact as follows, to wit: First. That this cause was commenced in this court by the filing of the complaint and the issuing of a summons thereon, on the 29th day of July, A. D. 1879. Second. That thereafter, to wit, on the 29th day of July, 1879, said summons was served upon the defendant personally by the sheriff of Lewis and Clarke county, as appears by his return on file. Third. That the predecessors in interest of the said defendant went into actual possession and occupancy of the property in controversy in the year 1866, were inhabitants of the town of Helena, and continued in such possession up to the time of the sale and conveyance of the same to defendant. Fourth. That the probate judge of Lewis and Clarke county, Montana territory, entered said town site, as provided by law in such cases, on the 7th day of January, 1869, and thereafter, on the — day of May, 1869, made to the predecessors in interest of said defendant a deed for lot 15, block 37, in said site, plat and survey, under which the defendant, as grantee of such predecessors, claims the property in controversy, since which date the defendant and his

predecessors in interest have been in the actual possession of the property in controversy, the same having been inclosed by a substantial fence in 1870, and prior to the issuance of the deed for lot 14 by probate judge to the plaintiff, which fence has been maintained by the defendant and his predecessors in interest from that date until the date of the commencement of this action. Fifth. That defendant, since his purchase of the said property, and his predecessors in interest since the year 1866 and up to the bringing of this action, were in the actual possession of the property in controversy, and since 1870 have had the same inclosed by a substantial fence, and during all of said time have claimed title to the same exclusive of all other right. Sixth. That on the 5th day of December, 1870, the probate judge conveyed by deed to the plaintiff the property in controversy, while the same was so in the possession of said defendant's predecessors in interest, and that ever since said conveyance said defendant and his predecessors in interest have occupied and possessed said property under chain of title thereto, with the knowledge of the plaintiff, and that the plaintiff, up to the time of the commencement of this suit, was not and never had been in the possession of said property.

The court finds in other findings that plaintiff received a deed to lot 14 from the probate judge on the 5th day of December, 1870, which deed covers the ten feet in controversy; that the defendant and his predecessors in interest have been in possession of the ten feet in controversy since 1866, and have held such possession by claim of title by virtue of their deed to lot 15.

The court finds as matter of law: First, that the defendant is the owner of the property in controversy by virtue of the occupation and possession of the same by his predecessors prior to and at the time of the plat and survey under the town site act and his deed of conveyance therefor. Second, that any claim plaintiff may



have had thereto was and is barred by the statute of limitations since his receipt of the deed for the same and before his cause of action, if any, arose therefor.

To which findings of law plaintiff duly excepted.

The court rendered judgment for defendant.

The appellant demurred to defendant's answer, which demurrer was overruled. The filing of a replication and going to trial is a waiver of the demurrer, and it cannot now be considered.

Appellant claims that the court erred in sustaining defendant's motion for non-suit. This claim cannot be considered in this court on appeal, for the reason that the evidence is not before us, and without it the question cannot be determined.

And as to the error urged in the admission of improper evidence, there is no statement on motion for new trial. It will be assumed that the court below proceeded correctly.

Whatever may be said as to the first finding of law by the court below, the finding of facts warrants the second finding of law, and it is correctly stated. The cases cited by appellant, when applicable, are themselves in point. 23 Cal. 437; 38 Cal. 78; 31 Cal. 154; 43 Cal. 250.

See section 34, Code of Civil Procedure, for the purpose of constituting adverse possession by a person claiming under a written instrument. It is deemed to have been possessed, etc., when protected by a substantial inclosure. The same is said in section 36. And in section 35 the law is stated to be that no more than the land actually occupied, and no other, is deemed to have been held adversely.

It is clear the several findings of law are correct, and are conclusive of the rights in this cause, and the judgment of the court below is affirmed.

Judgment affirmed, with costs.

*Judgment affirmed.*

STORY, respondent, v. MACLAY ET AL., appellants.

EVIDENCE — *Expert*.— Before a witness is allowed to draw and exhibit to a jury a map of a country to illustrate his testimony as to the reasonable and probable cost of transporting merchandise through the same, it should appear that he had some knowledge of the country and some means of knowing the cost of such transportation.

*Story v. Maclay*, 3 Mont. 480, reaffirmed.

REHEARING of the case reported in 3 Mont. 480. Appealed from first district, Gallatin county.

SANDERS & CULLEN, for appellant.

E. W. & J. K. TOOLE, for respondent.

Three propositions are discussed in the opinion in this case, in 3 Montana, p. 480, which will be considered in their order.

1. The transcript shows that the appellants objected to the testimony of the respondent, on the ground that it was incompetent. No objection was made in the court below to the competency of Story as a witness, and the same is deemed waived. Under the issues the testimony of respondent was competent. A party must lay his finger on the point of his objection to the admission or exclusion of evidence. Questions relating to the competency of a witness are entirely distinct from those respecting the competency of evidence. If Story was incompetent, the appellants were required to make this objection, so that respondent could have an opportunity to remove it and render himself competent. *Waters v. Gilbert*, 2 Cush. 27; *Kiler v. Kimbal*, 10 Cal. 267; *Martin v. Travers*, 12 Cal. 243; *Bliss v. Ellsworth*, 36 Cal. 310; *Satterlee v. Bliss*, id. 489, 507; *Hoxie v. Allen*, 38 N. Y. 175; 1 Greenl. on Ev. sec. 421; *Camden v. Doremus*, 3 How. (U. S.) 515, 530; *Hastings v. Cunningham*, 35 Cal. 549, 552; Transcript, p. 13; *Belk v. Meagher*, U. S. (not reported).

2. The map referred to in the opinion is not contained in the transcript, and this court cannot decide the questions concerning its correctness or its effect upon the jury. The map was used for a proper purpose, to explain the testimony of the witness in showing the route over which respondent's train carried appellants' goods, and thereby prove the reasonable value of respondent's services. The map was not introduced in evidence, and the witness was simply permitted to "explain and show the same to the jury." Transcript, p. 14. The explanations do not appear in the transcript, and appellants do not point out affirmatively any error herein. It was as competent for Story to show said route by his own map as it is for a witness in a lode case to make plats to illustrate his testimony. The presumption is that this was the sole use of the map by Story, and the transcript does not rebut this presumption. Every presumption is in favor of the ruling of the court below, unless it is shown to have been erroneous. The attention of this court was not called to this matter, and it proceeded upon the assumption that the map was introduced in evidence, and thereby error was committed. *Story v. Maclay*, 3 Mont. 484.

The said map was not received in evidence, and never was before the jury, and the rule announced in said opinion is inapplicable.

But if the court below erred in its action concerning this map, the appellants were not injured thereby. Forts Peck and Belknap and the Crow Agency have been established under the laws and treaties of the United States, and the court below takes judicial notice thereof. Courts take notice of the rivers, mountains, and leading geographical features of the land, and the distance between two places by the ordinary route of travel. 1 Greenl. on Ev. sec. 6, and cases cited; Wharton on Ev. secs. 335, 339, and cases cited; *Hipot v. Cochran*, 13 Ind. 175; *Mossman v. Forest*, 27 Ind. 233; *Peyroux v. Howard*, 7 Pet. 324; *Brown v. Piper*, 91 U. S. 37.



In the last case Mr. Justice Swayne said: "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper." The judge of the court below had the right to refresh his memory by resorting to said map. The appellants do not complain that said map was incorrect, and that the jury were misled by it. Said map, in showing anything except the said route, would be immaterial and irrelevant evidence, and could not affect the issues in the case.

3. Respondent claims respectfully that this court overlooked one fact in passing upon the alleged counterclaim of appellants. The pleadings of both parties deny that either ever carried freight for the other under any promise to pay. The respondent alleges an implied promise under common counts by appellants to pay him the reasonable value of the freighting for appellants, but denies any promise to pay appellants for the freighting done by them. Respondent does not deny the reasonable value of the freighting by appellants. Appellants collected the pay for the transportation of goods over both routes. The court below instructed the jury that this counterclaim as to its amount was admitted, but upon the condition that appellants show an implied or express promise to pay it. This counterclaim is based upon the alleged liability of respondent to pay for the labor done. It devolved upon the appellants to show that there was an express or implied contract by which respondent was required to pay for the work or labor done. This was the only issue in the case. Transcript, pp. 11, 12, and instructions of court.

The jury must have found that respondent's work was done under circumstances from which a promise on the part of appellants to pay therefor might be implied, while that of the appellants was not so done. No question is made, or could be made, upon the sufficiency of the evi-

dence to support the verdict upon this issue, which is the only one arising under the pleadings and instructions. The appellants show by the transcript that they received pay for their freight, and thereby prove that no injury was done them. It appears that the value of said work was \$1,130.40; that appellants performed the same; that the jury were so instructed; but that the jury found against appellants, and that there was neither an express or implied contract for its performance or promise to pay therefor. The appellants, in their instructions, treated this as the sole issue. There was no motion for a new trial by appellants on the ground that the verdict was against the evidence, and the judgment should be affirmed

WADE, C. J. This cause was heard at the August term, 1880, and is reported in 3 Mont. 480. We see no reason for disturbing the decision then rendered.

A witness may draw a map or plat to illustrate his testimony, but before doing so it ought to appear that he has some knowledge of what he is doing. A total stranger to a mine, a house or tract of ground would not be permitted to draw a plat of the same from mere hearsay, and exhibit the same to a jury to explain or illustrate his testimony. And all that the former decision decides in this regard is that a witness who attempts to draw a map of a country three or four hundred miles square, in order to show what it is worth to transport a certain number of pounds of merchandise through such country, and the reasonable and probable cost thereof, should at least have some knowledge of such country, and some means of knowing the probable cost of such transportation.

There is no question but the judgment is too large by about \$1,300, and we think the cause ought to be retried.

Judgment of reversal affirmed, and cause remanded for a new trial.

*Former judgment affirmed.*

## TERRITORY, respondent, v. SHIPLEY, appellant.

CRIMINAL LAW — *Objection first raised in appellate court — Insufficiency of description of property.*—Objections made for first time in appellate court, that the record does not show arraignment and plea, will not be considered, but those facts presumed.

An indictment for larceny of bank bills, describing them as "sundry bank bills issued by authority of the United States of America," and giving only the aggregate amount and value, is bad on demurrer for insufficiency of description. The number and denomination of each bill should be given, or the failure to do so accounted for.

*Appeal from Third District, Lewis and Clarke County.*

J. K. TOOLE, for appellant.

1. The indictment was defective in this: that the description of the property was loose and indefinite. It should have given the number and denomination of the bills alleged to be stolen, or excused the failure to do so, by proper averments. *People v. Ball*, 14 Cal. 101; *People v. Bogart*, 36 Cal. 245; *Commonwealth v. Sawtello*, 11 Cush. 142; *Merwin v. People*, 26 Mich. 298; Same Case, reported in 12 Am. Rep. 314; 2 Parker's Crim. Rep. 37; 2 Bishop Crim. Pr. 692; *Stewart v. Com.* 4 Serg. & Rawle, 194; *State v. Dowell*, 3 Gill & J. 310; *Com. v. Boyer*, 1 Bin. 201; *Com. v. Maxwell*, 2 Pick. 143; 2 Hale, 182; *People v. Jackson*, 8 Barb. 637; *People v. Taylor*, 3 Denio, 91; *Johnson v. People*, 4 Denio, 364; *People v. Caryl*, 12 Wend. 547; *State v. Murphy*, 6 Ala. 845; *Salisbury v. State*, 6 Conn. 101; 13 Johns. 90; *Lambert v. People*, 9 Cow. 578.

In this indictment there was no allegation that a more particular description of the bills could not be given. Where this is unknown to the grand jury, forms the only exception to the rule laid down by the authorities. *State v. Hinckley*, 4 Minn. 345, and authorities cited above; *Harkins v. People*, 16 N. Y. 342. And this allegation, that the denomination or other particular fact "was



unknown to the grand jury," is not merely *formal*; on the contrary, if it be shown that it was in fact known to them, then, the excuse failing, it has been repeatedly held that the indictment was bad, or that the defendant should be acquitted, or the judgment arrested or reversed. *Rex v. Walker*, 3 Camp. 264; 1 Chitty's Crim. Law, 213; *Rex v. Robinson*, Hull's N. P. 5956; *Blodgett v. State*, 3 Ind. 403; *Com. v. Hill*, 11 Cush. 137; *Hayes v. State*, 13 Mo. 246; *Reed v. State*, 16 Ark. 499; 1 Bish. Crim. Pr. secs. 300-302; *Merwin v. People*, *supra*; 12 Am. Rep. 316 (this case was decided in 1873); *Arnold v. State*, 21 Am. Rep. 175. This is the latest case I have been able to find upon the question. Here the court, after a general review of the authorities, held a similar indictment bad, and say: "As might be expected, there is some diversity on the subject in several of the states, but *principle*, *analogy* and *preponderating authority* incline decidedly in favor of our conclusion." Also, 52 Ind. 281; 2 Duvall, 159.

2. The judgment should be reversed for another reason: *i. e.*, there was no plea of "not guilty," and consequently no issue to be tried. *Haskins v. State*, 84 Ill. 87; *Gould v. People*, 89 Ill. 216; *Douglas v. State*, 3 Wis. 715; *State v. Sanders*, 53 Mo. 234; *State v. Montgomery*, 63 Mo. 296; *People v. Gaines*, 52 Cal. 480.

T. J. LOWREY, District Attorney, for respondent.

1. As to whether judgment should be reversed because the record on file does not disclose the fact of arraignment and plea in court below.

2. As to whether, in case judgment is reversed, the appellant should be remanded for trial.

As to the first proposition, respondent contends that judgment should not be reversed on the grounds stated. It is not nor can it be contended that, as a matter of fact, there was not an arraignment and a plea of not guilty regularly made on the trial. The record does not disclose

the fact; and the question to consider is, does the failure of the record filed to disclose the facts raise the presumption in this court that the plea was not entered? Under our system of statute in case of appeals, it is only necessary to put in the transcript such matters as will explain the irregularities complained of. In this case the appeal was taken on the ground that the indictment was defective.

I undertake to say that, in no transcript on appeal yet filed in this court, are all of the proceedings set forth fully, showing that every step was taken in the court below which the defendant had a constitutional right to have taken. The transcript shows that the defendant went to trial without further objection than to the form of the indictment. There is no rule of court nor statute requiring the transcript to contain a record of every act done in the court below.

The record in this case does not purport to be a record of all of the proceedings had upon the trial. See clerk's certificate. The clerk certifies only, "the foregoing, etc., contains true, correct, etc., copies of certain proceedings had therein, written," or to that effect.

It is well settled by precedent, that the fact that the transcript or record on appeal in criminal actions (even where the court is required to certify the record) fails or omits to state all of the proceedings necessary to a valid conviction, will not vitiate the judgment. The record must for that purpose affirmatively show that the omission was an actual fact. The appellate court, in the absence of an actual showing to the contrary, will presume the court below tried the case according to law. *People v. Conner*, 17 Cal. 354; *People v. Thompson*, 28 Cal. 214; *People v. Robinson*, 17 Cal. 363; *People v. Dick*, 32 Cal. 213; *People v. Cheney*, 17 Cal. 320; *People v. Bealoba*, 17 Cal. 389.

It might be construed otherwise if our statute and practice required, and the clerk had certified, that the

transcript should and did contain a full, true and correct transcript or record of every act and thing done upon the trial.

As to the question of the correct practice in case this court finds the judgment of the court below bad on the defendant's motion and appeal, I believe the true rule to be that the former trial was a nullity, and the defendant never has been put in legal jeopardy, and he is not protected by the constitutional provision, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," from a second or lawful trial. By successfully invoking the intervention of this court on the ground that he has not had a constitutional trial, he estops himself from saying that he has already been in jeopardy, etc., and a retrial does not in any way impinge upon his constitutional right. Any other view of the subject must result in a denial of a new trial in all cases, if carried to its logical conclusion. It must follow that the judgment of this court, in such a case, should be that there was a mistrial below, and the appellant remanded to the court having jurisdiction for a trial, and the prisoner be returned or delivered over to the proper county, there to abide the order of the court in which he was convicted, unless it also appears that no offense whatever has been committed. R. S. of Mont. sec. 404, p. 340; 1 Bishop's Crim. Law, sec. 673; *State v. Kenvose*, 33 Iowa, 365; *In re Kernan*, 7 Wis. 695; *People v. Webb*, 38 Cal. 467; *Peafer v. Commonwealth*, 3 Harris, 468; 3 Wheaton, Crim. Law, sec. 573 *et seq.*

GALBRAITH, J. The record in this case does not show that the defendant was arraigned and pleaded to the indictment.

This is assigned as one of the reasons for the reversal of the judgment. No objection appears to have been made upon this ground in the court below and the defendant was duly tried after demurrer.



We cannot reverse the judgment for the reason alone that the record does not show an arraignment and plea by the defendant. Where the record does not, as in this case, disclose such arraignment and plea, unless there is something to show affirmatively that the defendant was not arraigned and did not plead, such arraignment and plea will be presumed.

But the defendant demurred to the indictment, alleging, among other reasons therefor, the following, viz.: "That there is no sufficient description of the property alleged to be stolen, to put the defendant on his defense."

The description of the property alleged in the indictment to have been stolen was as follows: "Sundry bank bills issued by the authority of the United States of America, usually known as *greenbacks*, amounting in all to the sum of \$180, of the value of \$180," and "sundry bank bills issued by authority of the United States of America, usually known as *greenbacks*, amounting in the aggregate to \$589, of the value of \$589."

This description fails to give the number and kind, or denomination, of the bank bills. It is this failure which it is claimed constitutes the insufficiency of the description of the property and renders the indictment, consequently, bad.

One of the principal objects to be accomplished by an accurate, precise and certain description of property alleged to be stolen, in an indictment for larceny, is that the jury may be able to decide whether the chattel proved to have been stolen is the very same as that described in the indictment. It should, therefore, be described with sufficient certainty to enable the jury to so determine. Viewed in the light of this rule, the description complained of does not accomplish this object. There is not such a certainty of description as that a jury could find, if the property should be proved as described, that it was the very same property alleged to have been stolen in the indictment. A general description of the property

as "sundry bank bills issued by authority of the United States of America, usually known as greenbacks, amounting in all to \$180," or "in the aggregate to \$589," is plainly not a description with sufficient precision and certainty as to be a compliance with the above rule.

The description in an indictment for larceny should also be such as that, if the defendant be tried, he may be enabled to plead his conviction or acquittal to a subsequent indictment relating to the same property. It is true that the identity of the property may be shown by other evidence, but a failure to properly describe the property will render the proof of such identity more difficult. So far as the defendant could rely upon the description of the property in this indictment against a subsequent accusation relating to the same property, it is obnoxious to the objection of insufficiency of the description thereof.

Again, another object of the description is to inform the defendant with sufficient certainty and precision of the particular transaction constituting the offense with which he is charged, so that he may be able to prepare his defense thereto. We cannot think that this object is attained when, as in this case, in which bank notes or currency are the alleged subjects of larceny, the description merely states the kind of money generally, and the aggregate amount thereof, without stating the number and kind, or denomination, of the notes. This kind of property is as susceptible of this kind of description as coin or money, and in such a case "the number of the pieces and their denomination, and whether of silver or gold or copper, should be stated, and regularly the value of each." *Merwin v. The People*, 26 Mich. 298. The description of the property, therefore, does not comply with what are regarded as fundamental requirements in relation to describing the property alleged to be stolen, in indictments for larceny. These requirements have, as their ultimate object, fairness towards the defendant.

Any description, therefore, which is not set forth with sufficient certainty to satisfy the above requirements, or assign a good and sufficient reason for the failure so to do, may be taken advantage of by demurrer. The facts that are thus required to be set out are not, indeed, essential constituents of the crime. They are not vital to the accusation, being merely matters of description. But where they are not set forth, the reason for non-compliance with these rules should be stated in the indictment. The allegation that such facts are "unknown to the grand jury," where such is the case, would be an excuse for such non-compliance. This is not a mere formal allegation, for it has been often held that if it be shown that the particular fact was known to the grand jury, the indictment would be bad, or that the judgment should be arrested or reversed, or the defendant acquitted. 1 Bishop, Cr. Prac. secs. 300, 302, and cases cited. The indictment under consideration does not comply with the above requirements in relation to precision and certainty of description, or assign any excuse therefor.

These requirements are, in our opinion, reasonable, and not only do not conflict, but are in harmony with our own legislative provisions in relation to indictments, as set forth in article 8 of the Criminal Practice Act.

Judgment is reversed, and the cause remanded for a new trial.

*Judgment reversed.*



## MCADOW, appellant, v. BLACK ET AL., respondents.

CONVEYANCES, by power of attorney, though not under seal, nor acknowledged or recorded, if executed according to instructions and ratified, will bind parties thereto and third parties with notice.

Powers of attorney to be judged by same rule as deeds.

Equitable rights ascertained without compliance with statute.

Sections 203 and 1163, 5th Div. Gen. Laws (Rev. Stat. 1879), construed.

It was error in court below to reject testimony of plaintiff of a mortgage executed by power of attorney, because the same was not under seal, and acknowledged and recorded as required by section 203, Revised Statutes, coupled with offer to prove that the mortgage was executed according to instructions and ratified, and that defendants had full knowledge of these facts before purchase. .

Section 203 must be construed in connection with section 1163 of Revised Statutes. Powers of attorney must be construed by same rule as applies to deeds. No seal necessary to either. As between parties thereto, and third parties with notice, a deed is good without acknowledgment or record. *Taylor v. Holter*, 1 Mont. 712.

Whatever will validate a mortgage between the parties will validate it as to third parties with notice. Actual notice is as effectual as the constructive notice of record.

An execution creditor with notice takes the property subject to any lien or equity that might be enforced against the judgment debtor.

Compliance with requirements of statute is necessary to give legal validity to the signature of an attorney in fact, but the equitable rights may be ascertained without such compliance.

*Appeal from First District, Gallatin County.*

H. N. BLAKE and SANDERS & CULLEN, for respondents.

1. The complaint alleges that Black, "by and through his *duly authorized* agent and attorney in fact, Z. H. Daniels," executed and delivered a certain promissory note; that Black, "by and through his *duly authorized* agent and attorney in fact, Z. H. Daniels," executed and delivered, "under his hand and seal," the mortgage sued on; that "said mortgage was duly acknowledged and certified so as to entitle it to be recorded," and that Story has some interest or lien which is subject to the lien of said mortgage. Transcript, pp. 17, 18, 20.

The answer of Story denies these allegations. McAdow obtained a judgment against Black for the amount of said note, but the court below held that said mortgage was not a lien upon the real estate described in said mortgage and owned by Story.

2. The words "duly authorized," as used in the complaint, have a certain legal meaning. According to Webster, "duly" signifies in a due, fit or becoming manner, and properly and regularly. An attorney in fact is a person to whom the authority of another, the constituent, is by him lawfully delegated. Bouv. Law Dict. "Attorney" and "Authority;" Webster's Dictionary, "Duly:"

3. The testimony sought to be introduced by McAdow tended to prove that a letter had been written by Black to Daniels directing him, "as one of his attorneys in fact," to execute said note and mortgage. The letter was not produced. This testimony was properly excluded.

A. It did not support the allegations of the complaint that Daniels was the duly authorized agent and attorney in fact of Black. The *allegata* and *probata* must correspond.

B. The statutes of Montana regulate the conveyance of real property, and define clearly the only mode by which Black could confer upon Daniels the authority to execute said mortgage. As against Story, the letter was insufficient and incompetent evidence. Revised Statutes, 5th Division, secs. 178, 180, 181, 200, 203-208.

Sec. 203, page 442, defines a power of attorney, and is decisive of this appeal.

Sec. 212 defines the term "conveyance" as used in sec. 203 and other sections.

4. A mortgage lien upon real estate can be created only by an instrument in writing executed with the formalities required in case of a grant of real property. The mortgage being under seal, the authority of Daniels

should have been conferred by an instrument under seal. *Porter v. Muller*, 53 Cal. 667; *Videau v. Griffin*, 21 Cal. 389; *Maus v. Worthing*, 3 Scam. 26; *Hanford v. McNair*, 9 Wend. 54; *Blood v. Goodrich*, 9 Wend. 68; 1 Jones on Mortgages, sec. 129 and cases cited; 1 Story on Equity, sec. 96 and cases cited; 2 Kent Com. 614 and cases cited; Story on Agency, secs. 47, 49 and cases cited.

5. The mortgage was not notice to Story. There was no power of attorney from Black to Daniels on record in Gallatin county, Montana, and an instrument, to constitute notice, must be in the chain of title. Errors in a deed vitiate the record. An instrument which is not recordable under the statute is not notice to Story. R. S. p. 442, secs. 200, 201; Wade on Notice, secs. 97-99, 137, 138, 158-160, 174, 175, 204-206, and cases cited.

6. A mortgage defectively executed, whether recorded or not, vests no title in the mortgagee as against subsequent purchasers or judgment creditors. *White v. Denman*, 16 Ohio, 60; *Johnston v. Haines*, 2 Ohio, 55; *Van Thorniley v. Peters*, 26 Ohio St. 471.

7. The mortgage and testimony refer to Daniels as one of the attorneys in fact of Black. Every presumption is against the pleader, and it appears that Black had more than one attorney in fact when Daniels executed the mortgage. If such were the fact, all the attorneys should join in the conveyance, and the act of Daniels was void. Story on Agency, sec. 42.

8. Appellant does not seek relief from the informal execution of the mortgage, or the defective power of attorney to Daniels from Black. The complaint contains no allegation under which the letter to Daniels becomes competent.

9. The act of Daniels in executing said mortgage was not ratified by Black by an instrument under seal, and such ratification was necessary to give validity to the mortgage and render competent the testimony of Daniels. Story on Agency, sec. 242.



E. W. & J. K. TOOLE, for appellant.

In answering the points made by respondent, we will consider them in the order in which they are presented.

1st. We take it that the allegation of the complaint, that the mortgage which is alleged to have been executed "by and through the duly authorized agent and attorney in fact," will be supported and satisfied by proof of such authority or power as would be good and valid as against Story, a creditor and purchaser with notice.

The offer was, to show that a letter signed by Black was executed to Daniels, directing him to execute the mortgage in suit, and that he obtained the money mentioned in it and executed the same accordingly; that Story was afterwards a judgment creditor and purchased with notice of these facts.

Upon this point we contend that the authorities cited in the original brief of appellants clearly show the law in such case to be: 1st. That if there was no fraud in fact in the execution of the mortgage, whether the authority to do so was oral or in writing, a creditor or purchaser (especially with notice) could not avail himself of the provisions of the statute of frauds, which in this case was purely a personal privilege of Black. 2d. That the letter of attorney directing the execution of the mortgage, signed by Black, the principal, was all that is required, and was sufficient to defeat the operation of the statute, if it had been pleaded by Black, and could have been enforced against him. Hence we say that the decisions of the courts upholding such a power must be construed as satisfying the demands of the statute as to the due authorization of the agent or attorney. See authorities cited in appellant's original brief under — subdivisions.

2d. If respondent was in a situation to take advantage of the infirmity pointed out by his counsel, and it was fatal, the decisions referred to would not have been made. For further reply, see fourth subdivision of this brief.

3d. It will be seen from the bill of exceptions in the record referred to that the offer was to prove that the letter of attorney directed Daniels to execute the mortgage in question, not Daniels and some one else. We place no reliance in the power executed to Black and Daniels, but stand upon the letter of attorney with reference to the particular transaction involved in this controversy.

That the *allegata* and *probata* must correspond we do not dispute; that is, there must be no fatal variance. If, as we contend, the allegation "that the mortgage was executed by a duly authorized agent or attorney" is satisfied by the proof offered, then there is no fatal variance, and the allegation is supported by the proof in the sense used in secs. 110 and 112, Code of Civil Procedure. Respondent did not claim to be misled, but, as will be seen hereafter, by his own motion occasioned what he now complains of as error.

The sections of the statute referred to by respondent under this head are confined to instruments which are entitled to be recorded, so as to protect against purchasers for value, advanced by reason of constructive notice. This has been too often so decided by this court and other courts to be longer an open question. If we are correct, that article 2, entitled "Conveyances of realty," is applicable to constructive notice, under what is commonly known as the "Recording Act," then section 212, cited by counsel, is limited to that article, and does not apply to article 1, entitled "Of void and fraudulent conveyances and contracts," under which we claim the validity of the letter of attorney and competency of the evidence in reference to it depend.

It will be seen that each particular section of the article last mentioned, intended for the protection of creditors, expressly provides when the transaction shall be void as to them. They are always cases of fraud or constructive fraud — *i. e.*, fraud in fact or fraud in law. The cases in

which *bona fide* purchasers not creditors are to be protected are pointed out with equal particularity. And the cases wherein the transaction is simply void for want of formality at the option of either of the parties, when he is, notwithstanding, under a moral obligation, are equally defined under the statute. Under the well defined rules, the latter is for the benefit and protection of the parties to the transaction, and no one else can assert it for him. See authorities under — subdivision, original brief.

We invite the attention of the court especially to the three classes of cases to which the statute is applicable.

1st. When the transaction is void as to creditors, for whose protection it is intended and who can invoke its protection.

2d. When the transaction is defined to be a *bona fide* purchase, when they are entitled to shield themselves on account of it.

3d. When it applies to the parties to the contract, when neither is seeking to take the advantage of it, and each has a superior equity to enforce the contract than a creditor has to defeat its enforcement.

4th. As to the former part, or first proposition announced under this subdivision of respondent's brief, it is only applicable to conveyances entitled to be recorded and to which we have already referred. As to the latter portion of the proposition, it has no application to the case at bar. It is undoubtedly correct as a general proposition at common law.

But we have a statute that dispenses with the requisites of a seal, and renders the authorities cited inapplicable. See Codified Laws, p. 894, sec. 1163. This law was passed February 3, 1876, and has been in force ever since. If, then, there was a letter of attorney to Daniels directing him to execute this mortgage, and it was signed by Black, no ratification was required. The authorities cited by respondent on this point are inapplicable.

5th. We are unable to see what figure the record notice



cuts in this case. Actual notice is charged, and this was sought to be proven. The appellant claims nothing on account of any constructive notice imparted by the record. It would be idle to cite authorities to show that as against a judgment creditor or purchaser with actual notice of an antecedent equity, that their purchase or claim will be deferred to such equity.

6th. Section 171, General Laws, provides that such letter of attorney may be subscribed by a lawful agent; and section 160 only requires that there should be authority in writing, signed by Black, directing its execution, and this is what was sought to be established.

Whatever may be the statute of the state of Ohio upon that subject, ours is plain and unambiguous. Article 2 of our statute has been construed to apply to the recordation of such instruments. It has been held in several cases in this court, and such is undoubtedly the law, that the acknowledgment is no part of the conveyance, and that it can be enforced between the parties without any; and that where such is the case, a subsequent purchaser or incumbrancer with notice of such condition of things stands precisely in the shoes of his grantor. But above all, the records show that Story was a judgment creditor and purchaser under his judgment. And sec. —, Code of Civil Procedure, expressly provides that he shall only acquire by such purchase whatever interest the judgment debtor had. See *Chumasero v. Viall*, *supra*; 2 Estes, 605, 606; 12 Nev. 393; *Haupes v. Schultz*, Ill. (1878); *Brown v. Child*, 10 Pet. (U. S.) 209; *Brown v. Welch*, 18 Ill. 346.

It amounts only to a quitclaim of Black's title. See 12 Wall. 323; 3 How. 333; 11 Wall. 217; *Chumasero v. Viall*, 3 Mont. 376, and authorities cited in original brief, subdivisions 2, 3 and 4.

The acknowledgment, then, not being essential to the validity of the power of attorney, and the requirements of a seal being abolished, the letter authorizing Daniels

individually, as his attorney, to execute this mortgage, being signed by Black, is all that was required.

7th. The proposition announced under this heading of respondent's brief, in so far as it applies, refers to the necessity of all the parties holding the power joining in the execution of it. But it has no application whatever to the case at bar. The averment and evidence offered was to show that Daniels, individually and alone, and not jointly with some else, was authorized to and did execute the mortgage in suit.

8th. Respondent claims that appellant should have set up the equitable claim, if he has any, against Story. The records show that this was done, and that it was on his motion stricken from the original pleading. It is now too late for him on that account to complain of an error, if any it be, which he himself has occasioned. See original pleadings, Record, pp. 1 to 16 inclusive. The last point made by respondent has been heretofore fully answered.

Black comes in and admits the allegations of plaintiff's complaint, recognizes the acts of his attorney, was under a moral and legal obligation to carry out the contract, and Story cannot defeat him in doing so. See authorities cited under fourth subdivision of the original brief of appellants. If we are correct that, upon Black's answer admitting the facts set up, and his refusal to take advantage of the statute of frauds, this would place it beyond Story's reach to do so, appellants are entitled to judgment of foreclosure, and the court below should have so directed.

WADE, C. J. This is an appeal by plaintiff from a judgment in favor of defendants in an action to foreclose a mortgage executed by the defendant Black, by one Z. H. Daniels, his attorney in fact, to the plaintiff, to secure the payment of a certain promissory note for \$1,386.12, due in sixty-seven days from date, and dated April 23, 1878.

The defendant Story denies the validity of the mortgage, alleging that the attorney in fact who executed the same was not legally authorized so to do, and claims title by virtue of a purchase by him at sheriff's sale upon a judgment subsequent to the mortgage, and also by virtue of a conveyance from Black, the mortgagor, to the defendant Toole, and Toole to Story, which conveyances were subsequent to the mortgage.

The principal question presented by this appeal relates to the authority of the attorney in fact to execute the mortgage aforesaid. If he was not legally authorized, the judgment creditor takes the property free from the mortgage. If he was legally authorized, the property is subject to the prior lien of the mortgage.

For the purpose of showing the authority of Daniels to borrow of the plaintiff the money in the complaint mentioned, and the direction in writing signed by Black to execute the mortgage as his attorney in fact, and that he did so borrow the money and execute the mortgage upon a letter of instructions to him so to do, and after having accounted for the loss of said written instructions, the plaintiff sought to prove the contents of the writing, which was objected to for the reason that it was not shown to comply with the requirements of section 203 of the Revised Statutes of the territory, concerning conveyances of real estate, which objection was sustained. The plaintiff also offered to show that any and all rights of Story were acquired with a full knowledge of all the facts contained in the letter of instructions as well as of the execution of the note and mortgage of Daniels in pursuance of the same. But the court held the testimony incompetent for the reason that it did not comply with the requirements of section 203 aforesaid, and the same was excluded. The note and mortgage were excluded for the same reason, and bills of exception were properly saved.

Sections 2 and 3 (p. 442, Rev. Stat.) of the statute upon



which the objection to the testimony was based provides as follows: "Every power of attorney or other instrument in writing, containing the power to convey any real estate as agent or attorney for the owner thereof, or to execute, as agent or attorney for another, any conveyance, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved, and certified and recorded as other conveyances, whereby any real estate is conveyed or affected, are required to be acknowledged or proved, and certified and recorded." This section was enacted January 12, 1872, and must be construed in connection with section 1163 of the Revised Statutes, enacted February 3, 1876, which provides as follows: "All conveyances and instruments hereafter executed, which by the common law or the statutes of this territory are required to be executed under seal, shall be as effectual without such seal, to all intents and purposes whatsoever, as if the same had a seal attached thereto, and the same shall be interpreted as if the same were sealed." Therefore a power of attorney without a seal is just as effectual for any purpose as if executed under seal, and we are required to interpret a power of attorney drawn under section 203 as if under seal, whether such be the fact or not. This section 1163 abrogates the common law in this territory as to seals, and renders seals unnecessary to deeds or powers of attorney. A seal adds nothing to a deed. It adds nothing to the authority or efficacy of a power of attorney. If an attorney in fact, being authorized by a power of attorney, not under seal, should attach a seal to the deed executed in pursuance thereof, the fact would be wholly immaterial. He would not thereby do an unauthorized act, but an unnecessary one, without meaning. The fact of a seal in such a case would not affect the deed or his authority. There is no force in the argument that the power of attorney must be under seal, if the deed executed in pursuance thereof is under seal, when the seal has no meaning, and is not

necessary to the validity of either instrument. It follows, therefore, that the power of attorney authorizing the attorney in fact to execute the mortgage in question was not rendered invalid because not under seal.

Neither was it necessary that the power of attorney should have been certified, acknowledged and recorded to have made it good as between the mortgagor and mortgagee, in the mortgage executed in pursuance thereof. The mortgage in question might have been enforced against Black, the mortgagor named therein. He could not have attacked the power of attorney because not acknowledged or recorded. In the case of *Taylor v. Holter*, 1 Mont. 712, this court held that "the acknowledgment to a deed is no part of the deed, and, as between the parties to the instrument, a deed is good without acknowledgment, the acknowledgment and record being for the protection of third parties."

The same rule would apply to powers of attorney. The acknowledgment and record being for the protection of third persons, that is, for the purposes of notice, it follows that, if third persons have actual notice, a deed or power of attorney not acknowledged or recorded would be good as to them in equity. If, then, this mortgage might have been enforced by McAdow, the mortgagee, against Black, the mortgagor, it can be enforced against Story, with full notice and knowledge of the rights and equities of McAdow. If the acts of the attorney in fact, in borrowing the money and in executing the mortgage, had been ratified by Black, by his receiving the money and recognizing the mortgage, then it was a good mortgage as to him. He could not receive the money by virtue of the mortgage, and at the same time deny its validity. He could not ratify the acts of his attorney in borrowing the money for him, and repudiate his authority to execute the mortgage by virtue of which he received the money. And if Story had knowledge of the acts of the attorney in borrowing and receiving

the money, and of his execution of the note and mortgage, and of the fact that he was acting in the premises in pursuance of a power of attorney from his principal, and of the ratification of his acts by his principal in receiving the money and in recognizing the mortgage, such knowledge would charge him with notice of the lien and equities of McAdow, and would validate the mortgage as to him, and any title thereafter acquired by him would be subject to such lien and equities. And we may say, generally, that anything that will validate a mortgage as between the parties will also render the same valid as to third persons with notice.

The testimony offered and excluded tended to show that Story had knowledge of all the facts necessary to make the mortgage good and valid in equity as between the mortgagor and mortgagee. Proof of such knowledge would have made the mortgage good as to Story. The knowledge and notice that this testimony tended to prove that Story was in possession of was as effectual as the constructive notice of a record, and as to him and as to Black, the mortgagor, rendered the power of attorney effectual and gave it efficacy without certificate, acknowledgment or record, and made the mortgage executed in pursuance thereof valid in equity as to both. A person may be charged with notice of equitable as well as legal rights. He may be charged with notice of an equitable as well as a legal mortgage. If he has knowledge of such a state of facts as makes a defectively executed mortgage good as between the parties, then it is good as to him. If Story had such knowledge, then he stood in no position to attack the validity of the power of attorney to Daniels. Before any rights of Story had attached, knowledge on his part of such a state of facts as would protect the mortgage against Black, the mortgagor, would protect it against him.

An execution creditor with notice takes the property subject to any lien or equity that might be enforced



against the judgment debtor. Therefore, if Story had actual knowledge and notice of the mortgage and of the rights and equities of McAdow as against Black, then his judgment and title obtained thereby, or any subsequently acquired title, would be subject to such mortgage.

Section 203 of the statutes, which requires every power of attorney or other instrument in writing to be acknowledged, certified and recorded, is a statutory provision that must be complied with in order to give legal validity to the signature of an attorney in fact, notwithstanding, as in this case, the equitable rights of the parties may be ascertained and adjudged without such compliance.

Judgment reversed and cause remanded for a new trial.

*Judgment reversed.*



CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT,  
AT THE  
AUGUST TERM, 1882.

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JAMES M. SMITH, respondent, *v.* FREYLER ET AL., appellants.

COMMERCIAL LAW — *Suretyship — How proved — Its effect.* — The fact of suretyship may be proved by parol. Such proof does not change the contract, or the liability of the party making it.

It will not release a surety on a promissory note from his liability thereon, though the creditor fail or refuse to sue the principal debtor, after notice by the surety, even though at the time of such notice the principal debtor was good and afterwards became insolvent. The surety's remedy is to pay the note and himself sue the principal debtor.

*Appeal from Third District, Lewis and Clarke County.*

J. H. SHOBER, for respondent.

E. W. & J. K. TOOLE, for appellants.

WADE, C. J. This is an action upon a promissory note payable to plaintiff, and signed by defendants. Freyler, the answering defendant, alleges that he signed the note without consideration and as surety merely, which fact was known to the plaintiff. He further alleges that, at the time the note became due and payable, the principal debtor was solvent and able to pay the same, and that said surety demanded of the plaintiff, the payee of the



note, that he commence his suit and collect the same, which he neglected and refused to do, but, on the contrary, gave to the principal debtor further time in which to pay the note. He further alleges that the plaintiff theretofore agreed to and did release said surety from all liability on the note, and then and there told him to rest easy; that he would not look to him for the payment of the note, but that the principal was good enough, and that he would trust him for the payment thereof.

There was a motion for a judgment in favor of plaintiff, notwithstanding the answer, which was granted, and the defendant Freyler appeals.

Two questions are presented for determination, viz.: 1. Can a joint maker of a promissory note show by parol that he is surety merely, and that the payee had knowledge of such fact? 2. If, after the note becomes due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, is the surety thereby discharged?

1. The fact of suretyship may be proved by parol. There never was any dispute that such evidence was admissible in a court of equity, and since, under the code, equitable defenses are permitted in actions at law, all difficulties in the way of setting up such a defense, or in making proof of the same, are obviated. Such proof does not change the contract or the liability of the party making it. *Hubbard v. Gurney*, 64 N. Y. 457.

Says Shaw, C. J., in *Harris v. Brooks*, 21 Pick. 195: "So, when one of two promisors annexes the word 'principal' to his signature, and the other 'surety,' these descriptions do not affect the terms or the legal effect of the contract. They indicate the relation in which parties stand to each other, and give notice of such relation to the holder; but the fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but

to prove a collateral fact and rebut a presumption." "When several parties execute a joint, or joint and several, promissory note, not under seal, and there is nothing in the note to indicate that any of them are sureties, if some of them are in fact sureties, and this is known to the creditor, such sureties may, both at law and in equity, show by parol that they were sureties, and that they were known to be such by the creditor, and they will be entitled to all the rights, privileges and immunities of sureties, and will be discharged by any act of the creditor, after he had knowledge of the fact of suretyship, which would discharge any other surety. The great weight of authority and of reason is in favor of the law as above stated." Brandt on Suretyship and Guaranty, sec. 17, referring to the following authorities: *Hegdon v. Bailey*, 26 Ga. 426; *Lime Rock Bank v. Mallett*, 34 Me. 427; *id.* 42 Me. 439; *Grafton Bank v. Kent*, 4 N. H. 221; *Matheson v. Jones*, 30 Ga. 306; *Peper v. Newcomer*, 25 Ia. 221; *Cummings v. Little*, 45 Me. 183; *Kelley v. Gillespie*, 12 Ia. 55; *Bank of St. Albans v. Smith*, 30 Vt. 148; *Davis v. Mikell*, 1 Free. Ch. (Miss.) 548; *Fraser v. McConnel*, 23 Ga. 368; *Connell v. Allen*, 13 Ia. 289; *Roberts v. Jenkins*, 19 La. 453; *Brown v. Haggerty*, 26 Ill. 469; *Bruce v. Edwards*, 1 Stew. (Ala.) 11; *Jones v. Flemming*, 15 La. 522; *Flynn v. Mudd*, 27 Ill. 323; *Bank of Mobile v. James*, 9 Ala. 949; *Kennedy v. Evans*, 31 Ill. 258; *Stewart v. Parker*, 55 Ga. 656; *Riley v. Gregg*, 16 Wis. 666; *Bank v. Wright*, 53 Mo. 153; *Bank v. Abbott*, 28 Me. 280. See, also, *Bank of Steubenville v. Hoge*, 6 Ohio, 17; *Davis v. Barrington*, 30 N. H. 517.

In *Howenstine v. Pacific R. R. Co.* 55 Mo. 33, the supreme court of Missouri, by Wagner, J., says: "It has frequently been decided, and the rule is settled, that it is perfectly competent for a surety to show in what capacity or character he signed the note."

The same doctrine is now held in England since the statute authorizing equitable defenses in actions at law.

See *Pooley v. Harradine*, 7 Ell. & Bl. 431; *Greenough v. McClelland*, 2 Ell. & Ell. 424; Brandt on Suretyship and Guaranty, p. 2, note.

We do not think that any of the decisions of the supreme court of California, relied on by appellants as stating a contrary doctrine, go to the extent of holding that it is not a good defense, in an action upon a promissory note, for one of the joint makers to allege and prove by parol that he signed the note as surety in fact with the knowledge of the payee, and that the payee, having such knowledge, by his act or omission, as, for instance, by his contract with the principal, without the consent of his surety, extended the time of payment for a definite period for a valuable consideration. See *Aud v. Magruder*, 10 Cal. 282; *Shriver v. Lovejoy*, 32 Cal. 575; *Darwin v. Pardon*, 34 Cal. 278; *Sichel v. Carillo*, 42 Cal. 493; *Harlow v. Ely*, 55 Cal. 344.

The decision in the case of *Aud v. Magruder*, to which the subsequent cases generally refer, was rendered to controvert and overrule a former decision of the same court in the case of *Bryan v. Berry*, 6 Cal. 394, in which case it had been assumed that the obligation of a surety was that of a mere guarantor or indorser, and it was held, as it is held everywhere, that the obligation of a surety to the payee or holder is the same as that of the principal, which obligation is to pay the note when it becomes due. No one ever supposed that this obligation could be escaped, unless the payee or holder with full knowledge, by some act or omission, released the surety. Mere proof that one of the parties signed as surety is not material, and is no defense, because such proof does not in any manner affect his contract or obligation. But if the payee or holder, knowing that one of the makers of the note was surety merely, enters into a valid contract with the principal, whereby the contract of the surety is varied or changed without his consent, then the surety is discharged. And in order to show that the surety has been



so discharged by the act of the payee or holder, it is competent to prove the fact of suretyship by parol, and that the payee or holder had knowledge of such fact when he entered into the new contract, whereby the surety was discharged. We do not think any decision in California holds to the contrary.

2. As to the second question, "the great majority of the cases on the subject hold, in the absence of any statutory provisions, that if, after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal." Brandt on Sur. and Guar. sec. 208, referring to *Jenkins v. Clarkson*, 7 Ohio, 72; *Carr v. Howard*, 2 Blackf. (Ind.) 190; *Halstead v. Brown*, 17 Ind. 202; *Ex'rs of Davis v. Rider*, 2 McLean, 451; *Davis v. Huggins*, 3 N. H. 231; *Pickett v. Land*, 2 Bailey (S. C.), 608; *Nichols v. McDowell*, 14 B. Mon. 5; *Frye v. Baker*, 4 Pick. 382; *Stout v. Ashton*, 5 T. B. Mon. 251; *Gage v. Bank*, 79 Ill. 62; *Dillon v. Holmes*, 5 Neb. 484; *Inkster v. Bank*, 30 Mich. 143; *Langdon v. Markle*, 48 Mo. 357; *Hartman v. Burlingame*, 9 Cal. 557; *Dane v. Corduan*, 24 Cal. 157; *Hickok v. Bank*, 35 Vt. 476; *Hogboom v. Herrick*, 4 Vt. 131; *Coster v. Dunlap*, Rich. Eq. Cases, 77; *Croughton v. Duval*, 3 Call (Va.), 69; *Boulte v. Martin*, 16 La. 133; *Wyler v. Beck*, 13 Ill. 376; *Huey v. Reinly*, 5 Minn. 310; *Bizzell v. Smith*, 2 Dev. Eq. (N. C.) 27; *Thompson v. Brown*, 39 N. J. 2; *Hogshead v. Williams*, 55 Ind. 145; *Harris v. Newell*, 42 Wis. 627; *Pintard v. Davis*, 1 Spence (N. J.), 205; *id.* 1 Zabriskie (N. J.), 205.

When a surety signs a promissory note, his promise is absolute and unconditional to pay the same when it becomes due. And there is no escape from this promise

unless the payee or holder releases him. He does not promise that he will pay, if the payee or holder fails to collect the note by an action against the principal. The payee or holder does not receive the note with an implied promise that he will exhaust his remedy against the principal before proceeding against the surety. The obligation of the surety is to pay according to the terms of his promise, and he may protect himself by paying and then proceeding against the principal, and that is his remedy.

In the case of *Dane v. Corduan*, 24 Cal. 164, the court reviews the authorities and holds as follows: "As to the first question, admitting that a request and failure to prosecute has been shown, is the security exonerated from liability? Such a state of facts did not discharge the surety in England. His remedy was to pay the debt himself, and then sue the principal, or perhaps he might, by bill in chancery, compel the creditor to proceed against the principal. Chancellor Kent says: 'There is no case in the English law in which the personal application of the surety was held to be compulsory on the creditor at the hazard of discharging the surety.' 2 Johns. Ch. 562.

"There was a departure from the English rule on this subject in *Paine v. Packard*, 13 Johns. 175, and in that case the surety was held to be discharged. But this case was combatted and overruled by Chancellor Kent in *King v. Baldwin*, 2 Johns. Ch. 554. The case was appealed and in the court of errors reversed by the casting vote of the lieutenant-governor, who, like many senators voting on the question, was a layman. This fact detracts very much from the weight of the decision as authority, and the arguments of Chancellor Kent in the court of chancery, and of Senator Van Vechten in the court of errors, against the principle announced in the case, appear to us conclusive. The courts of New York have since followed the case of *King v. Baldwin*, while they have disapproved of the principle established by it. Mr. Jus-

tice Cowen, in commenting on this case in *Herrick v. Borst*, 4 Hill, 656, says: 'What principle such a defense should ever have found to stand upon in any court, it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent, was afterwards repudiated by a court of chancery, as it always has been both at law and in equity in England, but was restored on a tie vote in the court of errors, turned by the casting vote of a layman. Platt, J., and Yates, J., took that occasion to acknowledge that they had erred in *Paine v. Packard*, as Senator Van Vechten showed most conclusively that the whole court had done.' Yet he followed the case on the ground 'that the error had become inveterate.' The courts of Pennsylvania have also followed *King v. Baldwin*, but they assign as a reason for so doing, that in Pennsylvania there is no court of chancery, and the common-law courts exercise chancery powers to a very limited extent; that for this reason a surety in that state cannot, as in other states, compel the creditor to sue the principal. He is, therefore, without remedy, unless he can protect himself in this mode. In some other states *King v. Baldwin* has been followed. In some the rights and remedies of sureties are regulated by statute; and in others the doctrine of *King v. Baldwin* has been entirely repudiated. *Bull v. Allen*, 19 Conn. 106; 2 Am. Leading Cases and cases cited, 270; 1 Parsons on Notes and Bills, 236, and notes and cases cited. When a party contracts jointly with another, as in this case, as between himself and the creditor he is a principal debtor—he expressly undertakes to pay the debt. It is his duty, both morally and legally, to pay it; and we are of the opinion that the weight both of authority and reason is decidedly in favor of the proposition that the failure of the creditor to sue, when requested so to do by the surety, does not operate to discharge the surety from his liability. This was evidently the opinion of the supreme court of this state. *Hart-*



*man v. Burlingame*, 9 Cal. 561, and *Humphreys v. Crane*, 5 Cal. 175."

In *Harris v. Newell*, 42 Wis. 690, Ryan, C. J., said: "The contract of a surety is not merely a contract to perform upon the failure of the principal, but binds the surety equally with the principal. The surety assumes for himself the liability of the principal. And, as Lord Eldon remarks in *Wright v. Simpson*, 6 Vesey, Jr. 714, as between the creditor and the surety the creditor assumes no obligation of active diligence against his principal; and it is the business of the surety, not of the creditor, to see that the principal performs." "This is the legal contract; but because the surety has no interest in the contract of his principal, and because the creditor of the principal debtor may prejudice the surety by delay, equity will sometimes interfere in behalf of the surety, either against his principal or against his creditor. In such a case the surety may proceed in a court of equity against the principal to compel him to pay the debt, or against his creditor to compel him to proceed at law to collect his debt from the principal. 1 Story's Eq. sec. 327; *Wright v. Simpson*, *supra*; *Hayes v. Ward*, 4 Johns. Ch. 123; *Bishop v. Day*, 13 Vt. 81. This well established equitable jurisdiction appears to preclude the right claimed in this case for the surety — the right to notify the creditor to proceed, and, upon failure of the creditor to do so, to stand released at law. For, if the surety could thus of himself put the creditor in motion, it is difficult to see why he should resort to a court of equity to do for him what he could do for himself.

"This power to put the creditor in motion appears to be more safely reposed in the discretion of a court of equity than vested as a legal right, at his option, in the surety. The diligence of creditors is generally to be trusted; and when they forbear it is generally from prudential motives, having regard to all the interests con-

cerned. The legal right of a surety to interfere against such forbearance might well be mischievous and oppressive. It is true that the creditor and principal debtor may collude to the prejudice of the surety. That would be a proper ground for equitable interference. But it is safer, in any case, to leave the surety to the equitable remedy, to be exercised in view of all the circumstances, than to make him his own chancellor to control the action of his creditor."

After referring to the decisions in New York and Pennsylvania to the contrary, he continues: "But we believe that the doctrine of *Paine v. Packard*, as a rule of judicial construction, is confined to those two states. There is a full and learned note to *Paine v. Packard* and *King v. Baldwin*, in the court of errors, by the learned authors of Am. Lead. Cases, by which it appears that the doctrine of those cases does not prevail in England, in the federal courts, or in the courts of any other state in which it has not been adopted by statute. The learned counsel of the respondent cited cases against the doctrine from Maine, New Hampshire, Vermont, Massachusetts, Illinois, South Carolina and the federal courts. A review of these cases would fully sustain our view. And the learned counsel for the appellants cited in support of his position only cases in New York, Pennsylvania and in Alabama, Arkansas and Tennessee, which go upon statutes, approving of the rule of *Paine v. Packard*. But these cannot avail for the unsound doctrine against the strong and universal current of authority outside of the infected states. Indeed, the adoption in those states of such statutes may be regarded as a strong concession against the rule, independent of them."

The authorities are decidedly in favor of the proposition, in absence of any statutory provision controlling it, that if, after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards be-

comes insolvent, the surety is not thereby discharged. And if there were no authorities on the subject, considering the nature of the obligation of a surety, we do not well see how the contrary could be maintained. The contract of the surety to pay is as absolute as that of the principal, and he cannot change his absolute promise into a conditional one to pay, providing the creditor cannot collect from the principal.

The averment in the answer, that the plaintiff theretofore agreed to and did release the defendant from all liability on the note, is the averment of a legal conclusion; and the further averment that the plaintiff then and there told the defendant to rest easy, that he would not look to him for the payment of the note, but that the principal was good enough for him, and that he would trust him for the payment thereof, is a promise without a consideration, and would not have prevented the plaintiff, the payee, from at once commencing an action against the surety to collect the note.

The averment in the answer that the plaintiff, without the consent of the defendant, the surety, gave the principal debtor further time in which to pay the note, is deficient in two particulars at least. The time of payment does not seem to have been extended from any definite period, or for any consideration.

The answer did not state a defense to plaintiff's action, and the motion for a judgment in favor of plaintiff, notwithstanding the answer, was therefore properly granted.

The judgment is affirmed, with costs.

*Judgment affirmed.*



ELLEN SULLIVAN, respondent, v. ELIJAH M. DUNPHY,  
appellant.

**EJECTMENT.**—Where plaintiff alleges, among other things, lawful, continuous and exclusive possession in herself from August, 1870, to October, 1877, which is denied by defendant, who claims to have held sole, exclusive and peaceable possession of controverted premises since February, 1873, which the replication denies, and the jury find for plaintiff: *Held*, that this sufficiently sets forth a claim of adverse possession under the statute of limitations, which, by the special finding of the jury, had continued long enough to ripen into title.

Under averment of ownership in fee and right to possession of premises at the time of suit brought, a party can prove any facts which would entitle him to possession at such time. The allegations and denials in this case necessarily involve the question of adverse possession under the statute of limitations. A claim of much longer possession through plaintiff's grantors than this statute requires may be rejected as surplusage.

The allegations of pleadings must be construed with a view to substantial justice between parties.

*Appeal from Third District, Lewis and Clarke County.*

CHUMASERO & CHADWICK, for appellant.

This was an action of ejectment to recover the possession of lot 8, in block 30, in the Helena town site, county of Lewis and Clarke, and also to recover the rents and profits thereof. The plaintiff in her complaint avers that she is the owner of the said lot and entitled to the possession thereof, and that in October, A. D. 1877, the defendant ousted her from the possession thereof. The defendant by his answer avers that he is the owner thereof and in the possession, and entitled to the possession, of said lot; also pleads the statute of limitations as a separate defense.

The plaintiff, to sustain the issues upon her part, attempts to establish a title from the United States by a series of conveyances from one "Wau Lee," a Chinaman, as appears from such conveyances, who had received a conveyance from the probate judge of said county, and

said judge from the United States, for the town site of Helena, as trustee for the use and benefit of the several occupants of the lots or pieces or parcels of land embraced within said town site. The defendant also claims to be the owner of the said lot by virtue of a deed from the probate judge of the said county to one Henry L. Tanner, under whom defendant claims title by direct conveyance made by said Tanner to grantors of defendants. Wau Lee received his deed in September, 1869, and Tanner in February, 1873.

In the answer of defendant he denies each and every material allegation of the complaint specifically. Therefore the plaintiff was required, to warrant a recovery in said action, to prove that she had the legal title to the said property, and that she, by deraignment of title, held the lot by virtue of a conveyance from the United States and intermediate conveyance until the same vested in her. It will be seen, from the pleadings, that no right to the possession of the said lot is claimed in the complaint or replication by virtue of adverse possession or statute of limitations. Therefore such right, even if proved and found by a jury, could not have availed her anything. No authorities need be cited on this question.

1. The court erred in allowing the evidence offered and received against the objection of the appellant, relative to the entry of the said Helena town site, and the copy of the patent received therefor, for the reason that the same was incompetent for the purposes for which it was offered. See assignment of errors marked 1, a, b and c, and bills of exceptions Nos. 1, 2, 3.

2. There was error in receiving and allowing to be read in evidence the application made by Wau Lee, Chinaman, for entry of said lot, and in receiving the deed therefor. See assignment of errors, 1, d and e, and bills of exception 3 and 4. The deed introduced in evidence from the probate judge to Wau Lee, for said lot, recites that the grantee was a Chinaman. The laws of the

United States, or the treaties, do not permit a Chinaman to declare his intentions, or to become a citizen of the United States. And, therefore, under the various acts of congress, an alien Chinaman cannot avail himself of the benefits of said laws, and cannot receive a title to the public lands under either the pre-emption laws, homestead, town site or mineral acts. He can acquire no rights under said laws, and any conveyance to him from the government is void as to a citizen holding a title from the government to the land so conveyed to the alien Chinaman. *Courtney v. Turner*, 12 Nev. 345; *Chapman v. Toy Long*, 4 Saw. C. C. 28; *Van Valkenberg v. Bonn*, 43 Cal. 43.

Again. If the application had been made by a citizen of the United States, it would have been a nullity, as it does not comply with the requirements of the statute, and is made up principally of blank spaces.

3. There was error in allowing the contents of a supposed deed from Wau Lee to Lum Sing to be given to the jury, as there was no legal evidence of the execution or existence of the said alleged deed, and the witnesses attempting to give the contents conclusively showed that they were unacquainted with the contents thereof. That the proof in this case throughout shows that no such deed existed, and there was never any grantor by name of Wau Lee. It was further shown by respondent's witnesses that the paper mentioned by them was signed by a cross (×); that there were subscribing witnesses, who were not called to prove the execution, and the absence of such witnesses was unaccounted for. It seems to have been admitted upon the strength of some supposed acknowledgment that two parties thought they had seen. This supposed instrument was a muniment of respondent's title, and therefore strict proof must be made of its due execution and of its contents. We venture the opinion that by searching every work on evidence, and all of the court reports in our language, a case cannot be found where an important instrument like this



was admitted in evidence upon such flimsy proof. See bill of exceptions No. 4. See, also, the following authorities: 1 Whart. on Ev. secs. 140, 141, note, and authorities there cited; sec. 142 and note and authorities cited; secs. 144, 145, 147, 148; also secs. 696, 723, 725, 726, 727.

Upon examination of these references it will be seen that each and every proposition of law is fortified by a vast number of decisions, both American and English. And it will be further observed that every rule for the introduction of this evidence contained in the text or notes was disregarded, in permitting the witnesses to testify in the manner they did. See *Kelsey v. Hamer*, 18 Conn. 315-16; *Sicord v. Davis*, 6 Pet. 130-140; *Jackson v. Root*, 18 Johns. 73; *Jackson v. Frier*, 16 Johns. 193-196. But it is unnecessary to cite further authorities, as Mr. Wharton in his notes to the section above referred to has given them in full, and the number is too large to be cited separately.

4. The court erred in allowing the deed from Lum Sing to Patrick McCann to be read in evidence without due proof of its execution. This deed was executed by the mark (x) of the grantor, and was admitted in evidence by virtue of the acknowledgment and recordation, but it was never acknowledged, as shown by the evidence. The deed was made on the 30th day of September, A. D. 1879, and was acknowledged on the 18th day of the same month, as shown by the deed, and there was no proof to contradict such facts recited by the instrument. In fact, none could have been introduced on the trial, as there was no foundation for the reformation of the deed. As to the proof requisite *aliunde* of its execution, see the authorities last above cited as to the execution of instruments signed by a mark, and especially secs. 140 *et seq.* of 1 Wharton on Evidence; also see Assignment of Errors, No. 1, letter "f," and Bill of Exceptions No. 4; Laws of Montana of 1879, p. 653, sec. 1169.

5. There are many other errors as claimed by defend-

ant's counsel, committed during the progress of the trial, from the time of the introduction of the deed last named to the giving of the instructions given by the court, which are relied upon by appellant, which are too numerous to be noticed in a brief separately, but the same are specifically pointed out in the assignment of errors, and also contained in the bills of exceptions therein referred to.

6. In our opinion the first instruction is clearly erroneous. It states to the jury that as the defendant claims title to the lot in question by deed from same source as plaintiff, the probate judge, that he cannot question the entry made by such judge, but it is admitted that it had been "regularly and lawfully made."

We contend that this rule of law is not applicable in this case—an action of ejectment. Complaint shows defendant in possession. The legal presumption is that he holds it legally; and as the plaintiff must recover on the strength of her own title and not on the weakness of that of defendant, that this instruction was erroneous.

7. We claim that the second instruction is not law. The question of the applicant for the entry of the lot being an alien Chinaman is entirely ignored. See second point of brief, and authorities there cited.

8. The third instruction is erroneous. If any title passed to the said lot to Wau Lee, then, as we have heretofore shown, there has been no legal proof that Wau Lee ever conveyed to Lum Sing, or Lum Sing to the immediate grantor of the respondent. Therefore said instruction is not applicable and not law.

9. That all of the instructions following, given at request of plaintiff, are erroneous, for the reasons fully set forth in assignment of errors, and contained in bill of exceptions No. 8.

10. It will be seen from the instructions given by the court, that if, by reason of the recordation of respondent's muniments of title, including both of the deeds above named,—from Wau Lee to Lum Sing, and deed from

Lum Sing to McCann,—then the defendant would have constructive notice of plaintiff's title, and he would not be a purchaser in good faith, and therefore not entitled to set off permanent improvements on the premises against rents and profits. And on the strength of such instructions the jury found that the entry of the defendant was not in good faith, and judgment was rendered for the plaintiff and against defendant for such rents and profits. This we claim is error for which the judgment should be reversed. The respondent stands in this case without any title from the United States, or from any person holding said title. The appellant claims through a complete chain of title from the United States.

The deed from Lum Sing was not entitled to recordation, and would give no notice to any one, for it was not acknowledged or proved. The supposed deed from Wau Lee has not an existence under the evidence, and no claim that it was ever recorded. And as the court cannot say as to what effect the admission of these two deeds in evidence may have had with the jury in finding as they did, the case must be reversed. See *Sicord v. Davis*, 6 Pet. 130–140, *supra*. And as it is apparent that the admission of this incompetent evidence and the instructions of the court as to the *bona fides* of appellant's entry brought about the finding of the jury upon this question, the case, in our opinion, must be reversed. There are many other errors presented in the record and pointed out in the bills of exceptions and assignment of errors upon which appellant relies, but space will not admit of specifying them particularly in this brief, but they will be presented in the argument before the court.

SHOBER & LOWRY and E. W. & J. K. TOOLE, for respondent.

The action is ejectment. The complaint avers ownership, coupled with right of possession. The third count alleges quiet, exclusive and continuous possession of the



premises from August, 1866, until the 4th day of October, 1877, at which time the ouster is alleged.

1. Appellant claims that the plaintiff failed to allege the statute of limitations or adverse possession as a separate source of title, and hence must rely upon her paper or legal title.

The third subdivision of the complaint seeks to raise this very question; issue is joined upon it by the appellant's answer, and proof was introduced under it without objection, and the case tried in the court below upon that theory. After pursuing such a course, it is too late now to object, if, in the opinion of the court, the statute was not properly pleaded. But it was unnecessary to plead the statute. The allegation would be surplusage. Under the allegation of ownership, coupled with the right of possession, adverse possession could be shown. *Gillespie v. Jones*, 47 Cal. 259.

No error occurred by reason of the introduction of any evidence relating to the Helena town site, copy of patent or application of Wau Lee. Sufficient foundation was laid for the introduction of the former, and the latter was the best and competent evidence of the fact it seeks to prove. But the entire evidence to which exception was taken was not material, and could have worked no injury to appellant. The rule is that where both parties claim title from the same source, the paramount source need not be shown. *Whitman v. Steiger*, 46 Cal. 256. Such are the facts in this case, as shown by the evidence and the answer of defendant.

2. It was never contended in the court below that an alien Chinaman could acquire title under the homestead, pre-emption or mineral land laws. It was not necessary to maintain such a proposition to meet this case. The property conveyed was a portion of the town site of Helena. This property, as conceded by the brief of appellant, was held in trust by the probate judge for the use and benefit of the occupants thereof. No question of citizenship was

reserved, but occupancy alone is made the test of right to acquire title.

But if this property could only vest in a citizen, or one who had declared his intention to become such, this disability could not be taken advantage of by a private individual, and as between citizen and alien their titles are equally secure and sacred, and equally entitled to the protection of the law. The sovereign power, only by "office found," can divest the title. *Territory v. Lee*, 2 Mont. 124.

It is said "that an alien can take by deed and can hold until "office found" must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. *Gouverneur's Heirs v. Robertson*, 11 Wheat. 619 (top page), side page 356; *Craig v. Leslie*, 3 Wheat. 563; 7 Cranch, 603; 6 McLean, 5.

But, after all, such a question is not properly presented by the record. There is no evidence to be found in the record, nor was there any in the case, that "Wau Lee" was an *alien*. Appellant contented himself by showing upon the trial that Wau Lee was either a "wash-house" or a "Chinaman." That if a "wash-house," not being *in esse*, no title passed; and that if Wau Lee was a Chinaman, he could not, under existing laws, become a citizen. But, as before shown, citizenship was not involved, mere occupancy being the *sine qua non*. If, however, citizenship was necessary, it will be presumed. The authorities are uniform, so far as we know, that every person residing within the jurisdiction of the United States is supposed to be a *natural born* subject until the contrary is found. *Gouverneur's Heirs v. Robertson*, 11 Wheat. top p. 619; 6 Blackf. p. 488. Appellant could have had the finding of the jury upon this question. Their finding was that "Wau Lee" was a "person."

Appellant asserts again in his brief that the application by Wau Lee for a deed was a nullity, because the blanks

were not filled. The objection is technical. The requirements of the statute were substantially complied with; but both parties claiming under the probate judge, as well as by adverse possession, the evidence became immaterial. *Whitman v. Steiger*, 46 Cal. 256.

If there was any defect in the application or right in the appellant, before the probate judge's deed issued, it should have been asserted in the manner pointed out by the statute (sec. 1215, R. S. M. T.).

When a right is given and a remedy prescribed in the same statute, the remedy is exclusive of any other and must be followed. *Territory v. Deegan*, 2 Mont. 82; *Dudley v. Mayhew*, 3 N. Y. 15.

Upon a further examination of the record and bill of exceptions, we see that only a *general objection* was made to this evidence. See Bill of Exceptions, Record, p. 32.

It has been repeatedly held that this sort of objection will not do. He must point out the objection. *People v. Apple*, 7 Cal. 289; *Kiler v. Kimbal*, 10 Cal. 267; *People v. Manning*, 48 Cal. 335.

3. As to the third point raised by appellant we respectfully submit that there is nothing in it. See Amendment to bill of exceptions No. 4, Record, pp. 43 and 44.

This testimony, which was at that time claimed to be objectionable, and now sought to be made the basis of error, was, upon appellant's motion, taken from the case and the consideration of the jury. See Motion, Record, p. 84; Order striking out evidence, Record, p. 86.

If there was anything in the fourth point relied on by appellant as to the apparent discrepancy between the date and acknowledgment of the deed from Lum Sing to McCann or as to any other objectionable matter, appellant, in order to be heard upon it here, should have laid his finger on the particular objection in the court below; this he failed to do. See Bill of Exception No. 4, Record, p. 38.

Authorities have been cited to show that such an ob-



jection is worthless. *People v. Apple*, 7 Cal. 289; *Kiler v. Kimbal*, 10 Cal. 267; *People v. Manning*, 48 Cal. 335. But how could the introduction of this deed injure appellant? It was good without an acknowledgment to show color of title. *Taylor v. Holter*, 1 Mont. 688. The acknowledgment only entitled it to record so as to impart constructive notice. *Actual notice* having been found by the jury, the deed cut no figure in the case. See Special Findings.

5. Instruction No. 1 states the law correctly. *Whitman v. Steiger*, 46 Cal. 256. Numerous authorities could be cited to sustain it.

6. Appellant has not pointed out any error in any of the instructions, or referred to any authorities.

7. No error can be shown as to the notice of appellant respecting his good faith in making improvements. The question of notice was fairly submitted to the jury, and they find that appellant had both actual and constructive notice. See Special Findings 11 and 12, Record, p. 158. Actual notice having been found, any instruction touching the question of constructive notice (if erroneous) could not have injured appellant. We have answered the points of appellant as made by him as if they deserved serious consideration. But, for the purposes of this case, all that has been urged by appellant could be conceded, and yet the judgment should be affirmed. Lay out of view the deed from the probate judge to Wau Lee, patent, application, survey, etc., and the deed from Wau Lee to Lum Sing, and from Lum Sing to McCann, and the fact still remains that there is in evidence a deed from McCann to the plaintiff, in due form and of record, under which the plaintiff took possession of the premises, and to which deed no objection was made. She entered under this deed on the 2d day of August, 1870 (three years before Tanner's deed issued), and held such possession under her deed until October 4, 1877, when she was ousted by appellant. If the deed to Wau Lee was void,

and the statute of limitations never commenced to run until the probate judge issued his deed to Tanner, which was February 22, 1873, we find that the fact is incontrovertible that the plaintiff had acquired a perfect title by adverse possession before the ouster. See Findings Nos. 5, 6, 7, Record, p. 156. If anything not embraced in the special findings was necessary to support the plaintiff's case, that is presumed to have been found by the jury, and is covered by the general verdict. Such a possession, even under a void deed, bars the remedy of any other person, extinguishes the right and vests a perfect title in the adverse holder. *Leffingwell v. Warren*, 2 Blackf. (U. S.) 605, and authorities there cited.

GALBRAITH, J. This is an action of ejectment to recover the possession of a lot in the city of Helena.

The trial was by jury. Issue was joined upon the question of title in the plaintiff from the United States, through the probate judge as trustee, etc., and other intervening conveyances; upon questions of title in the defendant from the same source also, through intermediate conveyances; upon the question of quiet, lawful and exclusive possession by the plaintiff and her predecessors in interest for a period longer than that prescribed by the statute of limitations then in force, although the statute itself is not mentioned in the allegation; and upon the question of adverse possession by the defendant under claim of right or title for a period of more than five years, being the period prescribed by the statute of limitations now existing.

In our view of the case, questions in relation to all the issues, except that of the possession by the plaintiff, as above stated, may be dismissed from our consideration and our inquiry confined to that alone.

The jury, in their special findings, say that, on the 2d day of August, A. D. 1870, one Patrick McCann conveyed the premises in controversy, by deed, to the

plaintiff; that on that day the plaintiff entered into actual occupation thereof under the deed, and that she continued in the actual occupancy of the premises from that date until October the 4th, 1877.

Also in relation to the special issue presented: "Who was in possession of the said lot from March, 1874, to March, 1879?" the jury found that the plaintiff was in possession from March, 1874, till October, 1877, and the defendant from October 4, 1877, till March 1, 1879.

The jury also found that none of the predecessors in interest of the defendant entered into the actual, open, notorious and exclusive possession of the premises, adversely to the plaintiff, prior to the month of October, 1877. The deed from P. McCann to Ellen Sullivan, dated August 2, 1870, was offered without objection. And the testimony in relation to actual occupation and possession by the plaintiff was sufficient to support the above findings. There was a general verdict for the plaintiff.

The appellant averred and offered in evidence upon the trial, as the inception of his title, a deed from the probate judge to one Henry A. L. Tanner, to the premises in controversy, made the 22d day of February, 1873. The jury were fully instructed as to what constituted adverse possession under the statute of limitations, and the appellant does not complain of any error, or indicate any objection to such instructions.

According to the above findings and general verdict under the instructions of the court, the jury will be presumed to have found that the plaintiff took possession of the premises in controversy under a claim of right or title, and was in possession of the same under such claim of right or title when the deed from the probate judge to Tanner, under which appellant claims, was made. The jury found expressly that the defendant Tanner was not in possession of the premises until the 4th of October, 1877. The plaintiff therefore had the adverse possession of the property from the 22d day of February, 1873, un-



til the 4th day of October, 1877, being a period of more than three years. Prior to the 22d day of February, 1873, and up till the 1st day of August, 1877, title by means of adverse possession, under the statute of limitations, was acquired in three years.

We are warranted, therefore, in concluding from the special findings, general verdict and instruction of the court in relation to the acquirement of title by adverse possession, to which no specific objection is made by the defendant, that the jury did in fact find that the plaintiff had established title to the property by reason of adverse possession under the then existing statute of limitations.

It is claimed, however, by the appellant, "that no right to the possession of said lot is claimed in the complaint or replication by virtue of adverse possession or statute of limitations. Therefore, such right, even if proved and found by a jury, could not have availed her anything."

The complaint alleges "that this plaintiff and her grantors and predecessors in interest have been in the quiet, lawful and exclusive possession of said premises since August, 1866, continuously up to and until the 4th day of October, 1877, and that this plaintiff was in the lawful, continuous and exclusive possession of said premises from the 2d day of August, 1870, up to and until the 4th day of October, 1877." This allegation is denied by the answer, and the sole, exclusive and peaceable possession of the premises alleged to be in the defendant since the 22d day of February, 1873. The replication denies possession of any portion of the premises by the defendant or his predecessors in interest prior to October 4, 1877. As before observed, evidence was introduced upon the issue thus joined, special findings made thereon, and a general verdict.

The Code of Civil Procedure provides that the allegations of a pleading shall be construed with a view to substantial justice between the parties. In *Gillespie v.*

*Jones*, 47 Cal. 259, which was an action of ejectment, Niles, J., uses the following language: "The plaintiff's ownership in fee and right to the possession of the land at the commencement of the suit is averred, and under this he might prove any facts which would entitle him to possession at that time. The averment that the plaintiff's grantor had been in possession for more than five years was superfluous." The issues joined upon the above allegations and denials necessarily involved the question of adverse possession under the statute of limitations, and the averment that plaintiff had been in possession for more than three years prior to the 4th of October, 1877, would be merely surplusage.

The case was evidently tried upon this theory. In this view of the case, the general verdict is sustained by the pleadings, evidence, and the law in relation thereto.

The judgment is affirmed, with costs.

*Judgment affirmed.*

CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT,  
AT THE  
JANUARY TERM, 1883.

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MARY HERMAN, respondent, v. CHAS. M. JEFFRIES, appellant.

**APPEALS — Exceptions.**—Exceptions of a general nature which do not particularly state the point of exception will be disregarded on appeal.

**EXCEPTIONS — Agreements of counsel will not supply the statute requisites.**—An agreement of counsel that certain matters shall be deemed excepted to, without complying with the requirements of statute as to saving exceptions, will be disregarded. Such exceptions should be written down and filed with the clerk before the cause is submitted to the jury.

*Griswold v. Boley*, 1 Mont. 549; *McKinney v. Powers*, 2 Mont. 466, and *McKinstry v. Clarke*, 4 Mont. 370, affirmed.

**SOLE TRADER ACT — Married woman's separate property list.**—A married woman may protect her separate property from attachment for her husband's debts by filing a list thereof as required by law in the county where she resides at the time of such filing, and the same will hold good till she acquires a residence in another county.

While *en route* from one county to another, such married woman may file this list in any county through which she passes, and such filing would be a protection from seizure in such county. The purpose of the filing is notice, and it is no ground of complaint if such notice is given in all the counties through which a person might pass in moving from one to another. Length or permanency of residence are not necessary to give a right to file such a list. Good faith and rightful ownership are the main essentials.



*Appeal from Third District, Lewis and Clarke County*

A. E. MAYHEW and E. W. & J. K. TOOLE, for appellant.

This was an action commenced by Mary Herman, a married woman, against Chas. M. Jeffries, the sheriff of Lewis and Clarke county, for the possession of certain personal property which the said Jeffries, as such sheriff, had theretofore levied an execution upon as the property of Jacob Herman, her husband. The verdict was for the plaintiff, and the defendant appealed. Appellant claims that the court below erred in permitting the plaintiff (against the objection of appellant) to introduce in evidence her "declaration as sole trader" (p. 13 of transcript), and embodied in bill of exceptions No. 1 (Record, p. 12).

The declaration was incompetent. First. Because the instrument only purports to give authority to Mary Herman to do business in *Missoula county* (Record, p. 13), and the proof shows she had left Missoula county intending to locate at some other place. Record, pp. 19 and 20. Second. It does not appear that said declaration was made before a person authorized by law to take acknowledgments. 5th division Revised Statutes, p. 589.

The acknowledgment appears to have been taken before a person named Anderson Buker, who subscribed himself "justice of the peace." What authority is attached to such a signature as that? There is no seal to give it verity—no proof that he was a justice of the peace or a *de facto* officer. This declaration is presented outside of the jurisdiction of Missoula county, and the court below, sitting in another county, took it for granted that "Anderson Buker" was a justice of the peace because the county recorder (or a person assuming to be, whose signature is not authenticated by a seal) placed the same upon record. Appellant claims this was error. The court in Missoula county might have taken judicial notice of the

officers of that county, but it was presuming too much for the court below.

2. There was error in permitting the plaintiff to introduce in evidence the list of separate property embraced in defendant's bill of exceptions No. 2 (Record, p. 15). This statute, giving to married women unusual rights, is in derogation of the common law, and ought to be strictly construed against them. 5th division Revised Statutes, p. 588, sec. 586.

In order to make this statute available for the purpose intended, the court will require a strict compliance, and will not give the statute such a construction as that it will yield and bend to any mere local inhabitancy of a party. The statute referred to requires the list to be filed in the county where she resides. R. S. p. 588, sec. 586.

The testimony is uncontradicted that she had left Missoula county and had Benton as the objective point; stopped near Helena, in Lewis and Clarke county (where the list was filed), and where levy was made, but that she "had not settled where we would go." Record, pp. 19 and 20. Under such circumstances, the plaintiff's own indecision put her in such a situation that the law leaves her without a residence at the time the list was filed. *Burrows v. Miller*, 4 How. Pr. 349; *Stewart v. Platt*, 11 Otto, 735.

To have obviated this difficulty, she might have first established her residence, and then filed her list and removed her property; but a condition of things, analogous to those under consideration, have been the subject of judicial decisions, and it may not be profitable to discuss how the difficulty may have been avoided.

3. The court erred in refusing defendant's instruction on page 61, Record, for the reason set out in the objection of appellant in bill of exception No. 1. Buker's authority should have been shown.

4. The failure to give instruction No. 12, asked for by defendant, was, we claim, an error, which, in addition to those enumerated above, ought to reverse this case. It was uncontradicted that the indebtedness against Jacob Herman, upon which the levy in this case complained of was made, was created as early as 1878, and that no sole trader papers were filed by Mary Herman until in 1877, and no list filed until August, 1880. When Mary and Jacob Herman married, her legal existence was suspended or incorporated into that of her husband, and until she complied with the statute relating to married women she was incapable of holding any personal property. Her earnings belonged to her husband. 1 Black. Com. 441; 2 Black. Com. 443; 2 Kent Com. 112; Schouler's Dom. Rel. 111 *et seq.* Then the debt for which the levy was made being a pre-existing one, and the title to all personal property claimed by his wife, either through purchase or gift, being vested in the husband prior to a filing of list or declaration, and the husband being insolvent, we do not believe that the husband, as against such an existing creditor, will be permitted to divest himself of such property prior to its being listed. It was the husband's because the wife could not hold it. The creditor had a right to subject it to his debt; and to permit the husband in embarrassed circumstances to thus divest himself of property which the law declares to be his by a simple filing of his wife, would be a fraud upon the creditor that the courts ought not to uphold. *Guttman v. Scannell*, 7 Cal. 455; *Hurlburt v. Jones*, 25 Cal. 225.

The proposition of mingling the property of the husband and wife, as announced in instruction No. 13, asked by defendant and refused by the court, was the law, and under the evidence was applicable to the case. See Record, p. 00; Wells on Separate Property, "Married Women."



SHOBER & LOWRY and SANDERS & CULLEN, for respondent.

Respondent, for answer to appellant's brief, submits the following:

1. This was an action commenced by the respondent against appellant for wrongfully taking her property. The appellant seeks to justify on the ground that the property was not hers, but was the property of Jacob Herman, her husband.

2. The questions involved in the case were: 1st. Was the property, at the time levied upon by defendant, the property of Mary Herman? 2d. Had she complied with the laws of the territory in so placing a list on file or in making her declaration as sole trader, and recording the same as required by law, so as to exempt her property from the debts and liabilities of her husband?

3. We contend that she had strictly complied with sec. 868, p. 589 of the Revised Statutes of Montana territory, in making her declaration, and recording the same in Missoula county April 16, 1877. See Record, pp. 13, 14. Also with sec. 866, p. 588, by having filed a list of her separate property with the county clerk and recorder of Lewis and Clarke county, Montana territory (where the property was taken by defendant), on the 5th day of August, A. D. 1880, and prior to defendant taking possession of the same. See Transcript, pp. 15-18. The one relating to the separate property of married women, and the one in relation to married women as such traders.

Our statute is very clear, emphatic and unambiguous. Sec. 866, p. 588, R. S. "The property owned by any married woman before her marriage, and that which she may acquire after marriage by descent, gift, grant or otherwise, and the increase, use and profits thereof, shall be exempt from all debts and liabilities of the husband (unless for necessary articles procured for the use of herself and her children under the age of eighteen years)."

It is not contended that this was a debt created for

necessary articles for plaintiff or her children, and all that the law required was that a list of the said property of plaintiff be filed with the recorder of the county in which she resided to exempt it from any debt or liability of the husband, without any reference as to when or where such debt or liability was created.

At the time of filing the list of separate property plaintiff was in Lewis and Clarke county, Montana territory, and had no other residence. See testimony, Transcript, p. 20. Also, thought of settling in Helena when she left Missoula. See Transcript, p. 19; also testimony of Jacob Herman, pp. 22, 23. Helena was the point of destination when we left Missoula.

5. The declaration as "sole trader" was certainly upon its face regular and properly acknowledged and duly recorded, as appears by the transcript, pp. 13 and 14. The document, being recorded and in possession of plaintiff, was the only proper evidence. Sec. 609, p. 154, R. S.

6. There is no denial that Buker, before whom the declaration was acknowledged, was a justice of the peace. Even the depositions of defendant were taken by the same person. The presumption of law is that the officer acknowledging the same was duly authorized so to do. It was proper evidence to show that when the plaintiff owned the same before coming to Lewis and Clarke county. The separate property list of plaintiff was certainly proper evidence in the case. It was properly made out—contained a full and complete description of her separate property taken by the defendant, and was recorded in the only county in which plaintiff had a residence or resided at the time the property was seized and in the county where taken and before the property was taken. The evidence is to the effect that when plaintiff left Missoula, Helena was the objective point and not Benton. See Transcript, pp. 19, 20, 22, 23.

The only safe way for a married woman to protect her separate property from the debts or liabilities of her hus-

band in the territory of Montana, is to record in every county where she resides or passes through with the same, a separate list thereof — then she is safe beyond question.

The authority cited in 11 Otto, p. 735, is wholly inapplicable, and in no particular supports defendant's theory. That was a case in bankruptcy, and a joint assignment for the benefit of the husband's creditors was held good.

We have had a judicial interpretation of the statutes of Montana territory by the supreme court of this territory, affirmed by the supreme court of the United States, respecting the separate property of a married woman. *Griswold v. Boley*, 1 Mont. 550 *et seq.*

When a list of the separate property of the wife is recorded as required by statute, it is entirely freed from the debts of the husband as fully and completely as if the marriage relation did not exist. When the statute is complied with, the prohibition is absolute. And as to the separate property of the wife, it is competent for her to make her husband her agent. The record is notice, and all persons are bound to take notice of the same. 1 Mont. 559; *Knapp v. Smith*, 27 N. Y. 280; *Gage v. Dauchy*, 34 N. Y. 293; *Wells v. Buckley*, 33 N. Y. 518. The authorities above cited should settle the law of this case beyond controversy.

We are not trying this case by the "common law," but by and under the laws of the territory of Montana. Hence the authorities cited in 1 and 2 Blackstone, 2 Kent, and Schouler on Domestic Relations, are wholly inapplicable. The authorities cited in appellant's brief, to wit, 7 Cal. 455, and 25 Cal. 225, are not in conflict with any position assumed by respondent, but strongly support the position maintained by respondent.

The questions of ownership and fraud were fairly submitted to the jury under the evidence and the instructions of the court. The jury found the issues in favor of the plaintiff, and the evidence and law fully warranted and



justified the verdict. See testimony, Transcript, pp. 11, 12, 19-26. Plaintiff first got her start in 1864 (p. 11). Was given a colt by Heineman in 1868. See deposition, Transcript, p. 25. The testimony of defendant's witness Louise Dobbins corroborates the evidence of plaintiff. See Record, pp. 29 and 30. In fact no point is made in appellant's brief that the verdict is not supported by the testimony.

12. There are no exceptions saved to any instructions given or refused which are sufficiently specific to present the same for review. The exception to instructions refused, Nos. 11, 12 and 13, is general, and if any portion of said instructions were erroneous, the exception is of no force or effect. See Exceptions, p. 63. The same may be said of those given by the court. See Exceptions, p. 55; also p. 61. The same may be said of the exception to the introduction of the sole trader paper in evidence. See Exception No. 1, Transcript, pp. 12 to 15.

Exception to the charge of the court should point out the specific portions of the charge excepted to. A general exception to the charge of a court will not be sustained, even when taken to each and every part. *Lincoln v. Chaffin*, 7 Wall. (U. S.) 132; *Magee v. Badger*, 34 N. Y. 247; *Hicks v. Coleman*, 25 Cal. 122; *Chamberlin v. Pratt*, 33 N. Y. 47-52.

13. If the instruction No. 13 refused by the court, referred to in appellant's brief, was properly excepted to, it would avail nothing. There was no evidence to warrant the giving of said instruction. No instruction should be given to the jury which is not predicated upon some theory logically deducible from some portion of the testimony. There was no evidence to warrant any such instruction. *People v. Sanchez*, 24 Cal. 28; *Conlin v. S. F. & S. J. R. R. Co.* 36 Cal. 404; *People v. Byrne*, 30 Cal. 206; 3 Estes, 269.

We conceive that the instructions of the court given at the request of the defendant were as favorable to de-

fendant as the evidence or law would warrant. See instructions Nos. 1 to 11, transcript, pp. 55 to 61. The instructions given at request of plaintiff fairly presented the law under the evidence. See instructions Nos. 1 to 8, transcript, pp. 51 to 55. See, also, *Griswold v. Boley*, 1 Mont. 550 *et seq.*

The filing of the proper certificate in Missoula county constituted the plaintiff Mary Herman a sole trader, not alone in that county, but in the territory of Montana. Her property would therefore be exempt as such sole trader, notwithstanding it might be found in some other county in the territory.

#### REPLY OF APPELLANT.

Appellant offers the following in reply to the points of respondent:

The act of the legislative assembly of this territory which authorized a married woman to become a sole trader was passed in 1874. Laws of 1874, p. 93. The debt of Jacob Herman, for which the levy in this case was made, was contracted in 1864. See Record, p. 00. So far, then, as this act is concerned, up to the date of its passage the personal property of the wife, by whatever means acquired, belonged absolutely to the husband. How, then, could the act, as against *existing creditors*, make it her separate property? The rights, so far as the creditor was concerned, became vested. The husband himself could not settle the property upon his wife, because he was in embarrassed circumstances. This has been uniformly held. It could not be done by operation of law, because the rights of the creditor had become vested. *Gledden, Murphy & Co. v. Taylor*, 16 Ohio St. 518; *Jassay v. Delino*, 65 Ill. 469; *McDavid v. Adams*, 77 Ill. 155; *Kase v. Paynter*, id. 543; Wells, Sep. Prop. Married Women, p. 183, sec. 129; *Gun v. Barry*, 16 Wall. 610.

Concerning the "listing," it may be said that the in-

tention of the legislature must have been to exempt it from all debts and liabilities of the husband created after the filing of such list. This must be true, because we have shown that, prior to such filing, the property was the husband's, and, consequently, a creditor had a right to contract with reference to it being the husband's. This construction is supported by the authorities last cited above.

WADE, C. J. In this action the plaintiff, who is a married woman, seeks to recover from the defendant, the sheriff of Lewis and Clarke county, the value of certain horses, claimed by her as her sole and separate property, which were seized on execution and sold to satisfy a judgment against her husband.

1. To maintain her right and title to the property in question, the plaintiff, among other things, offered, and the court received, in evidence her declaration as a sole trader, and thereupon the defendant filed a bill of exceptions, which, after setting out the declaration, acknowledgment thereof and indorsements thereon, showing that the same had been duly recorded, proceeds as follows: "To the introduction of which (said declaration) defendant objected, which objection was by the court overruled, to which ruling defendant then and there duly excepted, and this, his bill of exceptions, is signed accordingly."

This objection is fatally defective, for that it does not point out in what respect the declaration is claimed to have been objectionable. The statute provides, sec. 281, that "the point of the exception shall be particularly stated," and we have so frequently held that an exception of the character of this one raises no question that we can consider, that it is not necessary to enlarge upon the subject here.

2. The attempt to save exceptions to the instructions of the court to the jury was by virtue of the following



stipulation, which by its language seems to have been entered into by the counsel of the respective parties after the case had been submitted to the jury and they had retired:

**“STIPULATION AS TO EXCEPTIONS.**

“It is hereby stipulated and agreed that each instruction given by the court for the plaintiff shall be deemed excepted to by the defendant; and that each exception offered by the defendant which was refused by the court shall be deemed excepted to by the defendant; and that each instruction which was offered by the defendant and modified by the court shall be deemed excepted to by the defendant; and all instructions offered and given for the defendant, and all offered for plaintiff and refused, and all offered by plaintiff and modified, are hereby deemed excepted to.”

There was no bill of exceptions as to the instructions; no pointing out of objections to the same; and for all that appears, this stipulation may have been entered into without bringing to the court knowledge of a single objection to the instructions, and after the rendition of the verdict by the jury. The effect of a bill of exceptions is to point out the error complained of, which must be signed by the judge or written down by the clerk. Statutes, sec. 281. An agreement between counsel that certain matters shall be deemed excepted to, without complying with the statute as to saving exceptions, is of no consequence whatever. As to exceptions to instruction to the jury, the statute (sec. 253) provides: “If any party to the trial desires to except to any instruction given by the court, or to the refusal of the court to give an instruction asked for, or any modification thereof, he shall reduce such exceptions to writing, and file the same with the clerk, before the cause is submitted to the jury.”

The stipulation aforesaid is in no sense a compliance with the statute.

This court, at the January term, 1882, in the case of *McKinstry v. Clark & Cameron*, 4 Mont. 370, affirming *Griswold v. Boley*, 1 Mont. 549, and *McKinney v. Powers*, 2 Mont. 466, held as follows: "The law requires the judge to indicate by numbering and marking the instructions offered to him, so that it shall distinctly appear what he gives, refuses or modifies. It also requires the parties to a suit, desiring to except to this action of the court, to specify the same in writing as to each instruction, and the objection to the same, so that the court may know whether the objection exists to the modification, or the giving, or the refusal of the court to give, the instruction. A general objection to all and to each of the instructions, that they are not law, or are misleading to the jury, is not enough. This is the doctrine of the cases cited, and is affirmed in this case."

3. The plaintiff, to further maintain her action, offered in evidence a list of her separate property, filed and recorded in the county of Lewis and Clarke, where the property was, and where the same, subsequent to such filing and recording, was seized by the defendant. The defendant objected to this evidence, for the reason that it was not shown that the plaintiff was a resident of the county in which the list was recorded, at the date of such record. The objection was overruled, and the defendant duly excepted.

It appears from the bill of exceptions that it was in evidence that the plaintiff with her family, at the time of the filing of the list, was camped in Lewis and Clarke county, and had the property in such county, and had removed to said county from Missoula, and had no residence outside of the county of Lewis and Clarke at the time of filing said list. It further appears from the evidence, which is properly before us, this being an appeal from an order overruling a motion for a new trial, that

at the time the list was filed the plaintiff was at Hot Springs, Lewis and Clarke county; that she had no other place of residence than Lewis and Clarke county, and that Lewis and Clarke county was her point of destination when leaving Missoula.

Being in Lewis and Clarke county with her family, that county being her destination when she left her former residence in Missoula, and having no residence outside of that county, her separate property list was properly filed in the county of Lewis and Clarke, where the property was, and where she resided, having no other place of residence.

There is no testimony tending to show that Choteau county was her objective point when leaving Missoula county. But if there was, and she had been *en route* to Choteau county when she stopped in Lewis and Clarke county with her property, still she might protect her separate property from the debts of her husband by causing a list thereof to be recorded in Lewis and Clarke county, or any other county through which she passed on the way to her future residence. She had left her residence in Missoula county and had not gained a residence in Choteau county. Her residence in Missoula county, and her declaration as sole trader and separate property list in that county, would protect her property until she had gained a residence in some other county, and while her property was so *en route* to such other county. Perhaps she was in search of a residence, taking her property with her. In such a case it was proper for her to file a list of her separate property with the recorder of every county that she entered, and apparently such a course was not only proper, but necessary. A married woman is not prohibited from changing her residence from one county to another, and she may protect her separate property wherever she goes. The purpose in requiring a separate list to be recorded is notice, and this purpose is



accomplished though the residence be for a longer or shorter period.

The defendant ought not to complain that the plaintiff gave too much notice of her rights. He would not have been injured if she had filed her separate property list in every county in the territory, and that would have been a proper precaution, if she had abandoned her residence, and was driving her horses from county to county, seeking another residence. Any other construction of the statute would deprive a married woman of its benefits, unless she remained a permanent resident of the county in which her separate list was first filed, and would expose her property to seizure for her husband's debts, if she undertook in good faith to change her residence.

If good faith characterizes the transaction, and the ownership of the wife is in no manner tainted with fraud, she may protect her property within the territory by complying with the statute, no matter for how short a period she may have resided in the county where the list is filed, providing she has no residence elsewhere.

If a married woman, a sole trader, in the business of raising and selling horses in the county of Missoula, wished to change her residence to some other county within the territory, in the hope of finding better ranges or conveniences for her business,—perhaps to Dawson, Custer or Gallatin county,—and should set out with her property, seeking a new residence, and it should require thirty or forty days to accomplish the journey, she may protect her property while *en route* (if her residence in Missoula and her declaration as sole trader, and separate list in that county, would not protect it until she had gained another residence within the territory), by filing her property list in each county that she entered, providing she had no residence outside of such county. And in such case a creditor of the husband would have no cause to complain. If she was still a resident of Missoula

county, her declaration would protect the property until she had lost her residence there and gained one elsewhere. If she had lost her residence in Missoula, and had no residence outside of the county where her list was filed, then her residence was within such county, and her list properly filed there. If a person has gained a residence in one place, he retains it until he has gained a residence elsewhere.

The judgment is affirmed, with costs.

*Judgment affirmed.*

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NOYES ET AL., appellants, v. BLACK ET AL., respondents.

MINING GROUND — *Bare possession* — *Right of possession*. — Mining ground cannot be held by possession alone against a valid location. Such location is a condition precedent to a grant from government. Possession follows and derives its right from a valid location.

Possession is sufficient to maintain trespass or ejection against a stranger, but not against one who has the right of possession.

CASES CITED AND APPROVED. — *Belk v. Meagher*, 3 Mont., 80; *Hopkins et al. v. Noyes*, 4 Mont. 550; *Tibbitts v. Ah Tong*, 4 Mont. 536; *McKinstry v. Clark & Cameron*, 4 Mont. 370; *Hauswirth v. Butcher*, 4 Mont. 299.

*Appeal from Second District, Silver Bow County.*

ROBINSON & STAPLETON, for appellants.

This action is a bill to quiet title to the premises described in plaintiffs' complaint, brought under section 354, Code of Civil Procedure. Appellants claim the premises as and for placer mining purposes, and respondents by virtue of a location of a quartz lode, located under the name of the Welcome Stranger lode, with three hundred feet of surface ground on each side of said lode. See Complaint, pp. 1 to 3, and Answer, 4 to 5, inclusive.

The findings of fact by the jury (p. 8, line 14, to p. 9, line 5) find the facts on which said cause should be de-

terminated, irrespective of the general verdict for defendants, and on which said findings the court should have entered judgment for plaintiffs.

The first of said findings is, that plaintiffs and their grantors had been in actual possession of the premises for placer mining purposes ever since prior to the location of the Welcome Stranger lode by defendants; and the second finding, that plaintiffs actually possessed the same when the suit was begun; and the third finding, that the Welcome Stranger lode is from one to seven feet wide. On these facts appellants claim to be entitled to judgment for all said premises, or at least to all but a strip through said land not to exceed seven feet wide.

This presents for consideration the rights of a prior placer claimant as against a subsequent quartz claimant.

The finding of the jury as to the actual possession of plaintiffs for mining purposes is a finding of title in them, for one in possession is in law presumed to be the owner till the contrary is shown, and no adverse finding destroys such presumption in this case. *Tyler on Ejectment*, p. 70; *Nagle v. Macey*, 9 Cal. 428; *Winans v. Christy*, 4 Cal. 79; *Castro v. Gill*, id. 40-95; *Burt v. Panjaud*, 9 Otto, 180; *Hess v. Winder*, 30 Cal. 355; *English v. Johnson*, 17 Cal. 108; *Atwood v. Fricot*, id. 37; *Pennsylvania Co. v. Owens*, 15 Cal. 135; *Sears v. Taylor*, 4 Col. 38; *North Noonday Co. v. Orient Co.* 6 Saw. 503; *Campbell v. Rankin*, 99 U. S. 262.

The defendants assert no claim to said premises of an earlier date than 1875 (see Answer, p. 5, lines 15 to 19), and the findings are that plaintiffs were in actual possession for placer mining purposes at and prior to said time; and said ground is placer mining ground; and that plaintiffs had been ever since in actual possession.

Appellants contend, then, that as they were in actual possession when defendants' location of the Welcome Stranger lode was made, defendants initiated their title by trespass on plaintiffs' rights, and could not initiate



their rights thereby — at least by taking possession of any portion of the placer ground; and that defendants could not locate, nor were they entitled to, any more than the actual width of the vein — seven feet.

The judgment of the court is for defendants, for not only the width of the vein, but the placer ground of plaintiffs; and ignores their prior rights altogether. That if this judgment is correct, then a placer claimant can acquire no right that he could maintain against a subsequent quartz locator.

The government makes no distinction as to rights of locators of quartz and placer claims. That when the title by location of a claimant is parted with by the government, whether in the form of a quartz or placer location, there is nothing for any one else to locate. The surface ground in this case had been located — possessed, equivalent to a location — prior to defendants' location; and the location of all but the actual width of the vein was located and was not subject to location by defendants.

Sec. 2319, U. S. statutes, provides only for location of ground subject to location; and it and secs. 2329, 2330, 2331 and 2333 recognize the rights of placer claimants as of equal validity with quartz claimants.

Sec. 2333 does not authorize the locator of a quartz claim, in so doing, to take away the rights of a placer claimant. All these sections in relation to locating mines are to the effect that a locator takes only such as there is for him to locate, subject to prior rights; and if there is nothing but the vein to locate, this is all he gets.

There is no question presented in this case of an abandonment by plaintiffs of their rights to the vein by applying for patent as contemplated in sec. 2333, U. S. statutes. We cite the court to sec. 2336, U. S. statutes. Where two veins intersect, the second locator can acquire no surface ground to the extent of six hundred feet where it crosses the first location; he takes only the vein.

We ask that the judgment be reversed and the cause

remanded, with directions to enter judgment for the plaintiffs.

KNOWLES & FORBIS, for respondents.

The plaintiffs set forth in their complaint that they, as tenants in common, are now, and for a long time hitherto have been, the owners of, in the actual possession, and entitled to the possession, of all that certain lot, piece or parcel of mining ground. Then follows a description of the ground. They then set forth that defendants claim an estate or interest in the premises. That their claim is fraudulent and without right. That, in consequence of said adverse claim, plaintiffs' placer claim is much depreciated in value.

This is an action in equity to quiet the title of plaintiffs. The defendants deny the ownership and actual possession of plaintiffs, and set forth title to the premises under the location of the same as the Welcome Stranger lode, and their possession since 1875.

The plaintiffs interpose a replication to defendants' allegation of ownership and possession.

A jury was impaneled in the case, but, notwithstanding, it was a trial by the court. The jury were only advisory. The court was responsible for the findings. See *Gallagher v. Basey*, 1 Mont. 457; *Basey v. Gallagher*, 20 Wall. (U. S.) 670.

The jury made answer to five special findings submitted to them.

1. Did defendants, in making their location, comply with all requirements of law?

Ans. Yes.

Have the grantors of plaintiffs and plaintiffs been in the actual possession of the ground in dispute ever since prior to the location of the Welcome Stranger lode, March 29, 1875, for placer mining purposes?

Ans. Yes.

2. Were plaintiffs in actual possession of the ground in

dispute when this suit was brought, November 2, 1881?

Ans. Yes.

3. What is the actual width of the Welcome Stranger lode?

Ans. From one to seven feet.

Then there is this general verdict:

"We, the jurors in the above cause, find a verdict for the defendants."

In the decree which follows, the court adopts the findings and general verdict of the jury, and says the same are not inconsistent, and orders judgment for defendants to be rendered in accordance with the verdict of the jury. Transcript, p. 10.

Now, upon the issues presented in this case, the jury did not find upon all of them in its special findings. It found nothing upon the issue of ownership. The issue of ownership and the issue of actual possession were two distinct issues. They were so presented in the pleadings. They are so in the very nature of the action brought. There is nothing to show whether plaintiffs ever located the ground in dispute.

Upon the issue of ownership—that is, title—the jury in their general verdict must have found for defendants. If they did not, then the presumption is that the court found upon this issue in favor of defendants. *San Francisco v. Easton*, 46 Cal. 100; *Lyons v. Leimback*, 29 Cal. 139; *Morse v. Swan*, 2 Mont. 306; *Thorp v. Freed*, 1 Mont. 664. As we have shown, a material question was not passed upon in the special findings. Where material matters are omitted in the special findings, and there is a general verdict, the general verdict should govern. *McDermott v. Higby*, 23 Cal. 489.

Even in a law case plaintiffs were not entitled to judgment. Much less would they be in a chancery case, where the court is responsible for the findings of fact, and can set aside the findings of a jury at its pleasure.

We think it will be found, upon an examination of the



cases cited by appellant, that all that is claimed in them is that possession is evidence of title. If it is only evidence of this, then, as to the finding of possession, the court only adopted a finding of evidence, and not upon an issuable fact. When the court finds only evidence, and not issuable facts, the law will imply findings upon all the issuable facts in support of the judgment. *Bernal v. Wade*, 46 Cal. 663.

Possession is only evidence of title — a fact from which title may be presumed. If all that a party had to do was to prove possession, then the only thing left an opposite party would be to disprove possession. If actual possession is title, then a person wrongfully in possession would have title. As against a mere stranger, possession is sufficient to maintain trespass or ejectment; but as against one having title coming from the paramount source of title, it would be insufficient. In this case the defendants were not mere strangers. They claimed as locators of the premises, and the jury found that they located in accordance with law. A location in compliance with the requirements of law gives a locator a grant to the possession of the premises for mining purposes. This has been so held by this court, and it is the doctrine upon which the supreme court of the United States base their decision in the case of *Belk v. Meagher*, 14 Otto, 279. That court says in that case: "The right to possession comes only from a valid location. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone," etc.

Now the defendants made a valid location. There is nothing to show that the plaintiffs did.

In the above case of *Belk v. Meagher*, 14 Otto, 288, the supreme court says of Belk's possession: His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but not enough, as we think,

to prevent an entry peaceably and in good faith, for the purpose of securing a right under the act of congress to the exclusive possession and enjoyment of the property. The defendants having got into possession and perfected a relocation, have secured the better right.

The findings show that defendants had a grant to the right of possession, and there is nothing to show that plaintiffs had any such grant.

The possession is not the title to mining ground; but the right to possession is. Possession alone will not avail in this action. *Stark v. Starr*, 6 Wall. (U. S.) 410; *King v. French*, 2 Saw. C. C. 441; *City of San Diego v. Allison*, 46 Cal. 162.

If the question between quartz or lode locations and placer mining locations were in issue in this case, I do not see that there would be much trouble in the case.

The jury found the possession of plaintiffs had been for placer mining alone. Now such a location is only for one easement. There may be several in the same ground. Washburn on Real Property, vol. 2 (3d ed.), 345; *O'Keefe v. Cunningham*, 9 Cal. 589; *The N. C. & S. C. Co. v. Kidd*, 37 Cal. 282, and page of opinion 315.

In this last case the court say: "A party's right is limited to the general object for which it was acquired, and another party may acquire another right for a similar or different object not in conflict with the prior right."

Now in this case the plaintiffs held possession, as found by the jury, of the premises for placer mining purposes. The defendants had properly located it for lode mining purposes. They were different rights, and both could exist in the same ground. The plaintiffs, then, would have no right to have their title, if they ever had any, quieted, so as to exclude this right of defendants. When it came to applying for a patent to the ground, it is evident the right is given to the lode claimant.

It is evident, from a consideration of section 2325 of

the Revised Statutes of the United States, that it refers to lode claims.

By section 2327 it is said placer claims may be subject to entry and patent under like circumstances as lode claims.

In section 2333, it is evident that the owner of a placer claim, which embraces a lode claim, cannot patent it unless he owns the lode claim.

We do not think, however, that, considering the findings and judgment in this case, this question is properly presented for the determination of this court.

WADE, C. J. This is the case of actual possession against a valid location. The plaintiffs, by virtue of possession alone, attempt to hold mining ground as against a valid location of the same ground. This they cannot do. In the case of *Belk v. Meagher et al.* 3 Mont. 80, we held that "there is no grant from the government, under the act of congress, unless there is a location according to law and the local rules and regulations. Such location is a condition precedent to the grant. Mere possession, not based upon a valid location, would not prevent a valid location under the law." The supreme court of the United States, affirming this decision, say: "The right of possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local rules and regulations." *Belk v. Meagher*, 104 U. S. 284.

In the case of *Hopkins et al. v. Noyes*, decided at this term, we held that "Possessory titles do not live upon possession alone. They must be supported by proof of a compliance with the law that gives the right to and sustains the possession. The mere naked possession of a



mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location made in pursuance of the law and kept alive by a compliance therewith." 4 Mont. 550.

In the case of *Tibbitts v. Ah Tong*, decided at this term, it is said: "The right to the possession comes only from a valid location. It is a part of the location itself. . . . The right to locate and the right to possess go together. They are parts of the same grant. They belong each to the other. Neither can exist without the other. . . . Location is the foundation of the possessory title, and possession under it, as required by the law and the local rules and customs, keeps the title alive. The government holds the superior title in trust for the person so holding the possessory title until, by complying with the law, he may acquire the full title." 4 Mont. 536. To the same effect, see *Russell v. Hoyt*, 4 Mont. 412; *McKinstry v. Clark & Cameron*, 4 Mont. 370; *Hauswirth v. Butcher*, 4 Mont. 299.

As against a stranger, possession is sufficient to maintain trespass or ejectment. But that is not this case. Here the plaintiffs attempt to stand upon bare possession without a location, as against the defendants, who have a location — a grant, which carries with it the right of possession and the right to acquire full title. In such a case there is no presumption of title in favor of the party in possession. But, if there was, he who shows a valid location, as against naked possession, has the better right.

The judgment is affirmed, with costs.

*Judgment affirmed.*

## TIBBITTS, appellant, v. AH TONG, respondent.

**MINERAL LANDS — Disabilities of an alien — Effect of such land passing into the possession of an alien — Possession and right of purchase inseparable.**— The exploration and purchase of the mineral lands of the United States are by law (see R. S. U. S. sec. 2319, p. 427) free only to citizens of the United States, or those who have declared their intention to become such. An alien can neither locate, possess, purchase or acquire title by patent to such mineral lands.

A possessory title of mineral land, founded on a valid location, and held by compliance with local mining laws, may be transferred from one to another, so long as it does not pass into the hands of one incapable of acquiring complete title, in which latter case the grant reverts to government, and the land becomes subject to relocation.

The right of possession cannot be held by one incapable of holding by purchase from government, else the government might be deprived of its power to sell forever. Possession and the right and power to purchase are inseparable.

*Appeal from Second District, Deer Lodge County.*

WADE, C. J. The question presented by this appeal arises upon the following facts: On the 11th day of April, 1880, James McDonald and others, who were citizens, owned and held possession of certain placer mining claims, situate in the Pioneer Mining District, Deer Lodge county, under locations before that time duly made, and on that day, for a valuable consideration, sold and conveyed the same to the defendants, who are alien Chinamen, who went into the possession thereof under and by virtue of such sale, and have ever since possessed, worked and mined the same; and while they were so working and mining said ground, the plaintiffs, who are citizens, on the 9th day of April, 1881, duly located the same, and now claim to be the owners and entitled to the possession thereof. Hence the question: Are the plaintiffs entitled so to own and possess the ground by virtue of their location, notwithstanding the location by the defendants' grantors, and the purchase and possession of the defendants? In other words, Can an alien take and

hold the possessory title to an unpatented mining claim, which has been conveyed to him by a citizen, as against another citizen who has located and demands possession of the same; or does such conveyance have the effect to so restore the claim to the public domain as to authorize its location and possession by a citizen?

If this question were to be determined as at common law, its solution would be without difficulty. That law authorized an alien to purchase and hold real estate as against every one except the government; and the government could not divest him of his title or interest therein except upon inquest of office found, which was an inquiry by the king's officer or commissioners before a jury, concerning the king's title or right of possession to lands or tenements, goods or chattels. *Fairfax's Devisees v. Hunter's Lessee*, 7 Cranch, 619-20; *Gouvernier's Heirs v. Robertson*, 11 Wheat. 348; *Elmendorffs v. Carmichael*, 3 Litt. (Ky.) 472; Same Case, reported in 14 Am. Decisions, 86, and note; 2 Bouv. Law Dic. title "Inquest of Office."

The doctrine of the common law, however, is inapplicable, since the question must be determined by an interpretation of the act of congress opening the mineral lands of the United States to exploration, occupation and purchase. That act provides: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." R. S. sec. 2319, p. 427.

We have upon several occasions held that a location under this section of the law carries with it the grant of



an easement from the government to the person making the location, in the ground located. *Robertson v. Smith*, 1 Mont. 414; *Belk v. Meagher et al.* 3 Mont. 79. The easement so granted by virtue of a location in pursuance of the law is the right to the possession, and the right to purchase when the law has been fully complied with. The location is the foundation of the possessory title, and possession under it, as required by the law and the local rules and customs, keeps the title alive. The government holds the superior title in trust for the person so holding the possessory title until, by complying with the law, he may acquire the full title.

But this easement or grant to the locator cannot be severed or divided. Being made up of the right to the possession and the right to purchase, if the right to the possession fails, the right to purchase is gone, and if the right to purchase is defeated, the right to the possession cannot be maintained. So, therefore, the person making the location and his grantees, who only succeed to his rights, must have the capacity both to possess and to purchase; otherwise the grant of the government becomes divested and the ground again open to location. There cannot be such a location under the law as entitles the locator or his assignees to the possession without the right to purchase, nor to purchase without the right of possession. Possession and the right to purchase go together. They are parts of the same grant, which is a unity, and which becomes vested by the act of location. Therefore the right to the possession cannot be transferred to any person who is incapable of causing his possessory right or title to ripen into a full title by purchasing from the government. Such a person could not so occupy and possess; he could not so comply with the law and the local rules and customs as to preserve his right to the possession, because such right can only be kept alive by being linked to the right to purchase. Possession under a location is preliminary to a purchase, and can only be

of that character. It is one step in the process by which the government parts with its title to the purchaser. And so he who takes possession under a location, or he to whom such possession is transferred, must be capable of becoming a purchaser from the government, for such possession is part of the purchase. If, therefore, possession is transferred to one who, under the statute, is incapable of becoming a purchaser from the government, such possession being part and parcel of the purchase, is illegal, and such transfer of possession is equivalent to abandonment, and opens the ground to location and possession by any one capable of making and holding the same.

The term "occupation," as used in the statute, is equivalent to possession. The right to occupy is the right to possess and to hold. The right to locate is included in the right to occupy, and incident to a location is the right of possession. But the right of occupation and purchase is limited to citizens and to those who have declared their intention to become such. Therefore an alien cannot occupy or possess under this grant from the government. If he cannot take by purchase, he cannot hold by possession, for they both require the same capacity and are parts of the same right. If he cannot occupy so as to become a purchaser, he cannot so as to hold the possessory title.

The locator of a mining claim is the assignee of the United States so long as he complies with the conditions imposed by the law. And this relation must be kept up when the claim is transferred. He to whom the possessory title is assigned is always the assignee of the United States. Hence he must be such a person as may sustain that relation, and hence such a person as might establish the relation in the first instance; in other words, such a person as might make a location. The argument that a location is a grant, and that, after a grant, the claim granted does not belong to the United States, and

therefore cannot be granted again, would be legitimate and forcible, were it not for the fact that the grant which is evidenced by a location must be kept in being by possession, and, as we have already seen, this possession, being preliminary to and one of the steps towards acquiring title by purchase from the government, must be by a person authorized to make such a purchase.

These views are not unsupported by authority. In the case of *Chapman v. Toy Long*, it is held that "the license contained in section 2319, *supra*, to explore, occupy and purchase any of the lands of the United States containing mineral deposits, is confined to citizens of the United States and to those who have declared their intention to become such. The defendants, being aliens, are not within the purview of the law, and, by an almost necessary implication, are prohibited from the exercise of the rights conferred by it." 4 Sawyer, 28.

In the case of *The Golden Fleece Co. v. The Cable Con. Co.* 12 Nev. 322, the court holds as follows: "As to the first point, it is clear that an alien who has never declared his intention to become a citizen is not a qualified locator of mining ground, and he cannot hold a mining claim, either by actual possession or by location, against one who connects himself with the government title by compliance with the mining law."

The case of *The Territory v. Lee*, 2 Mont. 124, is referred to as an authority in favor of respondents. That case involved the validity of an act of the legislature entitled "An act to provide for the forfeiture to the territory of placer mines held by aliens," and it was held that the territory had no interest in claims held by aliens or others, and no title thereto, but that by the operation of this act of the legislature, the territory became the owner of the possessory title to such claims and authorized to sell the same for its own use; so that by the force of this statute, it became the owner of property in which it never had any interest, and which never belonged to it,



thereby forfeiting the property of an alien to itself, while, if any forfeiture should have taken place, the property forfeited would necessarily belong to the United States. Hence the act was declared a nullity. The question as to the right of an alien to purchase from a citizen who owned the possessory title to a mining claim was not in the case, and if, incidentally, the decision touched upon the rights of aliens to hold real estate, their rights at common law were referred to, and not their rights under the act of congress in question. And we say again that if any forfeiture of the possessory title to a mining claim, for any reason, takes place, the forfeiture is to the United States, who owns the paramount title, and after such forfeiture the claim becomes again subject to location.

The right of location upon the public mineral lands is a privilege granted by congress, but it can only be exercised by qualified persons. One of the elements of a location is possession. Possession is as essential to the grant as is the discovery of a mineral deposit or the marking and boundary of the claim. An alien cannot make a valid location. He may under a discovery identify the claim by proper boundaries and enter into possession, but the grant of the government does not attach to him; he is incapable of receiving it; and one of the reasons is, that he cannot so possess the claim as to call the grant into being and give it life. This kind of possession that goes with and forms a part of the location is necessary in order to keep the grant of government alive. And so if a person is not qualified to take possession in the first instance, he is not qualified to hold possession thereafter. The subsequent holding of possession must relate back to, and give character to the location. Therefore the possession of an alien under a valid location is equivalent to possession with no location at all, for the possession must at all times form a part of and support the location. The right to the possession comes only from a valid loca-

tion. It is a part of the location itself. Therefore he who cannot make a valid location cannot hold possession as the grantee of one qualified to take and to hold the possession. The right to locate and the right to possess go together. They are parts of the same grant. They belong to each other. Neither can exist without the other. If the grant, by assignment or conveyance, falls upon one who is incapable of making a location, his possession is of no consequence; if upon one not qualified to hold possession, the location becomes void.

A valid location is the purchase of a privilege. It is the grant of such an easement or property in the claim located as carries with it the right to acquire a full title upon complying with the law. In order to keep this grant alive, the locator and his grantee must at all times be capable and qualified to receive the full title from the government. This is the scope and extent of the grant, viz., the privilege of becoming a purchaser and of receiving a full title from the government. And so, as a location is but the grant of a privilege to purchase, this privilege cannot be bestowed upon or conveyed to one who is incapable of receiving a government title. Therefore a citizen having this privilege cannot convey the same to an alien, who cannot become a purchaser. If he does, he thereby abandons his privilege, and the grant reverts to the government, which may again bestow it upon any qualified person.

And so a valid location is the acquisition of a possessory title which carries with it the right to purchase from the government. The locator or his grantee is the grantee of the government. This possessory title or right may be bought or sold; but, as between the government and the purchaser, the relation of grantor and grantee must always be maintained, and the purchaser must always have the capacity to receive the full title from the government when he has fully complied with the law. If, therefore, an alien has not the capacity so to possess the

public mineral lands as to make a valid location thereon, so neither has he the capacity to become the grantee of the government through a purchase from a third person who is such grantee. The first grantee acquires his interest because of his ability to possess, and his right to purchase. He conveys to his grantee such rights and interests as belong to him by virtue of his location. One of those rights is the privilege of purchasing from the government and receiving a complete title. His grantee takes his place and becomes the grantee of the government. Therefore, if an alien cannot take by location, he cannot hold by purchase. He cannot do by indirection what he cannot do directly. If the government cannot grant to him the privilege of purchasing, no grantee of the government can bestow upon him this right. If the government cannot grant to him a possessory title, the title that comes from a valid location, then no grantee of the government can convey to him such a title. The reason is that there must be attached to the possessory title the right to acquire a full title. The possessory title, in order to be valid, must be such an one as may ripen into a perfect title. It must be such a title as may be completed by a patent. The grantee of the government cannot enlarge the grant. He cannot convey to an alien what the government is prohibited from conveying to him. Therefore, if the grantee of the government conveys to an alien and goes out of possession, and ceases to represent the claim, he thereby abandons the claim and it becomes subject to location by any qualified person. Such a conveyance is a nullity. It is a conveyance to one incapable of receiving the grant, and is void.

If an alien cannot become the grantee of the government, he cannot become the grantee of the government's grantee. That is only a roundabout way of doing what the government prohibits, viz., the grant of a privilege to an alien which carries with it the right to receive a patent from the government. It is making a grantee of



the government greater than the government itself. It is authorizing him to do what the law prohibits the government from doing. If an alien cannot take possession from the government, he cannot from a grantee of the government. It is the same grant though the grantees may change. It is but one privilege though conveyed from one person to another. Upon each and every conveyance of the privilege or easement the grantee becomes the grantee of the government, and therefore must be capable of receiving the grant as from the government. If he has not this capacity the conveyance is void; and if his grantor abandons the claim, it reverts to the government and becomes subject to location. The full title must exist somewhere. If the privilege or easement does not vest in the grantee, it is still in the government. If it does vest in the grantee, the government holds the balance of the title in trust for him who has the right to purchase. But if the privilege or easement is conveyed to one who cannot become a purchaser, and who cannot receive or hold it, and his grantor has lost his right by abandoning the possession, the grant of the easement necessarily reverts to the government.

The possessory title to a mining claim is held by representing the claim according to law and the local rules of the mining district. The right to represent a claim is included in, and always belongs to and accompanies, the right to make a location. The right to locate and the right to represent are kindred rights, and one of them cannot exist without the other, being necessarily attached to it. They are the parents of each other. The moment that one is called into being the other is born. The right to locate presumes the right to represent, and the right to represent presumes the right to locate. They are linked together. They each have to do with the acquisition of title. They each involve an entry upon the public lands for the purposes of title. They each require the same capacity and call into action the same

right. Therefore he who cannot acquire a possessory title by location cannot hold it by representation. A disability that prohibits a location prohibits also a representation. Being acts of the same quality and kind, and for the same purpose, viz., the acquisition of title from the government, the prohibition that attaches to one also forbids the other. Hence, if an alien cannot locate a claim, he cannot so represent it as to hold against one who is qualified to make a location.

If an alien can hold a possessory title, he can thereby defeat the government in the sale of its property. The government cannot convey to an alien, and, if the possessory title of an alien is good, he may hold it forever, and thereby forever defeat the government in its right to dispose of its property.

The judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

#### DISSENTING OPINION.

GALBRAITH, J., dissenting. The record in this case shows that the respondents, who are Chinamen, and have never declared their intention to become citizens of the United States, purchased the ground in question, which was unpatented mining ground, from Bailey and others, who were citizens of the United States, and in possession of the premises at the time of the purchase by the respondents, and who made a valid location thereof. The appellants claim that the vendors of the respondents having parted with all claim to the premises, and the same being now in the possession of and occupied by persons who are not citizens of the United States and have never declared their intention to become such, that therefore it became public mineral land of the United States and subject to location.

The property in question belongs to that class of property which is termed a mining claim. At the time of the

conveyance of the ground in question by the vendors to the respondents, the location was a valid one, the vendors having in all respects complied with the laws of the United States and the local rules and customs of the mining district in making such location, and they were in possession thereof. This is not disputed.

The character of the title to a valid mining claim or location is that of a grant by the United States of its exclusive possession and enjoyment. This is the highest character of title, except perhaps that of a public grant by the government where the act of congress is itself the grant. It is equivalent to a patent; it will support ejectment.

A mining claim perfected as the one in question has been is property in the fullest sense of the word; it may be the subject of sale, mortgage and inheritance. These positions are supported by abundance of authority. In the case of *Forbes v. Gracey*, 94 U. S. 762, the supreme court of the United States, by Miller, J., says: "These claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast. They are property in the fullest sense of the word, and their ownership, transfer and use are governed by a well-defined code or codes of laws, and are recognized by the state and federal governments. These claims may be sold, transferred, mortgaged and inherited without infringing the title of the United States." The same court, in *Belk v. Meagher*, 104 U. S. 279, by Waite, C. J., says: "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent." In the same case, referring to the claim therein in dispute, which was an unpatented mining claim: "On the 19th day of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and sub-



sisting homestead or pre-emption entry. . . . A location, to be effectual, must be good at the time it is made; when perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

In *Bell v. Meagher et al.* 3 Mont. 65, the supreme court of this territory, by Wade, C. J., says: "By the terms of this section (referring to section 2319 of the Revised Statutes of the United States), the locator of a mining claim has a possessory title thereto, and the right to the exclusive possession thereof. The words imply property. The right to the exclusive possession and enjoyment of a mining claim includes the right to work it, to extract the mineral therefrom, to the exclusive property in such mineral, and the right to defend such possession. The right to the exclusive possession and enjoyment of property, accompanied with the right to acquire the absolute title thereto, presupposes a grant, and the instrument of this grant, as applied to mining claims upon the public lands, is the act of congress above referred to. This act being of general application to all the mineral lands belonging to the government, and conferring a title or easement therein upon the locator thereof, and vesting the right in him to become the absolute owner to the exclusion of all others, is a legislative grant, and being given by act of congress, is equivalent to a patent from the United States to the same. The title thus conferred upon the locator of a mining claim is a legal title, as distinguished from an equitable one, and such a title as would support an action of ejectment."

We cannot understand that there could be language expressing in stronger terms that mining claims, such as that in question, are property, or indicating a more absolute dominion over it by the owner, than that above given. Such language certainly, if it means anything, must indicate that the title which was in the United States to the property granted, that is, the right to the

exclusive possession thereof, has been wholly divested, and has become absolute in the grantee. It ceased, therefore, to be public mineral land of the United States, and subject to location as such, under section 2319, and could only be restored to that condition by abandonment or forfeiture.

The respondents do not claim by virtue of a location by themselves under the act of congress, but by virtue of a conveyance to them of a title by those who have divested the title of the United States. Section 2319 does not relate in any way to lands which have ceased to be public mineral lands of the United States, nor is there indicated therein any intention to modify the existing law in relation to the transfer of property to an alien, or to create a distinction between mining claims and any other species of property which may be purchased by or devised to an alien, subject to the well-known rule of law, that, "though an alien may purchase land or take it by devise, yet he is exposed to the danger of being divested of the fee and of having his lands forfeited to the state upon an inquest of office found. His title will be good against every person but the state." 2 Kent's Com. pp. 61, 62.

The title to the mining claim in question having passed out of the United States, and being vested in Bailey and others, they had a right to convey the same to the respondents, who could take and hold the same, subject to the above rule of law. "They could take and hold until office found." *Ferguson v. Neville*, 61 Cal. 356.

We have said that to restore this property to the public domain there must have been an abandonment or forfeiture thereof. The sale to the respondents was not an abandonment by the vendors. Their right to sell to an alien is recognized by the above rule of law. Therefore the sale to an alien no more constitutes evidence of an abandonment than a sale to a citizen. The disability is not in the vendor to sell, but in the vendee to hold, and

that only so far as the government is concerned, and only then when it has proceeded by office found.

Again, such a sale does not work a forfeiture. There is no provision of the statute, nor any rule of law, which will cause such a sale to work a forfeiture. But even granting that such was the case, it can only be taken advantage of by the government. If such a sale could cause a forfeiture, it would be so because it is in the nature of a condition subsequent. The supreme court of the United States, Field, Justice, giving the opinion, says: "It is settled law that no one can take advantage of the non-performance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and if they do not see fit to assert their right, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way, from the year books down. And the same doctrine obtains where the grant upon condition proceeds from the government. No individual can assail the title that it has conveyed on the ground that the grantee has failed to perform the condition annexed.

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office, at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property, for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate;



but, as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.'" *Schulenberg v. Harri-man*, 21 Wall. 44; *United States v. Repeutiquez*, 5 Wall. 211, 268.

There is no pretense that any action of the character above indicated has ever been taken in this case. The title to the mining claim in question was therefore still in the respondents when the appellants made their location. It was not then a part of the public domain. "A relocation on lands actually covered at the time by another valid and subsisting location is void, and this not only against the prior locator, but all the world, because the law allows no such thing to be done." The judgment of the district court should have been affirmed.

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HOPKINS ET AL., respondents, v. NOYES ET AL., appellants.

MINING TITLES — *Possession only insufficient — Proof necessary — Real estate — Deed necessary — Husband must join wife in action to recover — Co-tenant can maintain action.*— Mere possession of a mining claim, without location, or under a location dead by reason of non-compliance with local rules and regulations, presumes no grant and carries no right of possession against one claiming under a valid location.

Proof of possession only, on a trial of an issue as to forfeiture for non-compliance with the rules and regulations of a mining district, is immaterial, and may be ruled out without error.

The locator of a mining claim takes as by grant from government, and such possessory title is real estate, expressly declared to be such by Montana statute, and is within the statute of frauds, and can only be transferred by deed.

A conveyance of real estate to wife, with no words of limitation, vests title in her, and the husband is only entitled to rents and profits. The husband should be joined with wife in action to recover such estate.

Where parties hold an undivided third interest in real estate by good title, though that to the other two-thirds may be defective, they can maintain action for the exclusive possession of the entire property against all the world, except their co-tenants.

*Appeal from Second District, Silver Bow County.*

J. C. ROBINSON, THOS. L. NAPTON and G. W. STAPLETON, for appellants.

Appellants claim a reversal of this cause, as is shown by exception No. 2, on pp. 45, 46 and 47 of transcript on appeal.

The question presented for the determination of the court is: Can a title to placer mining ground be acquired by purchase, accompanied by actual delivery of the possession of the premises, and followed by continuous possession to the date of the bringing of this suit, there being no deeds to any portion of said premises?

We consider that such possessory title is sufficient to defeat an action of ejectment as in this case. See *Campbell v. Rankin*, 99 U. S. 261. A conveyance in writing is not necessary to the valid transfer of a placer mining claim. See *Mining Co. v. Taylor*, 100 U. S. 37.

An equitable title created by delivery of possession and payment of purchase money is sufficient to defeat ejectment, and the party taking possession can enforce the conveyance. 3 Washburn on Real Property (4th ed.), 235; Story's Eq. Jur. sec. 790.

2. La Blue & Forrest were the original locators of the land claimed by plaintiffs, who appointed Jeremiah Denome their attorney to convey. He conveys in his own name, representing himself as attorney for La Blue & Forrest, by signing his name first, the representation following. This makes it his own, and not that of La

Blue & Forrest. See *Morrison v. Bowman*, 29 Cal. 337; *Echols v. Cheney*, 28 Cal. 157.

3. Conveying property to a married woman, unless the calls of the deed are to her *sole* and *separate* use, immediately vests the title in the husband; and the allegations of the complaint in this cause vary from such proof, and defendants' objection should have been sustained, as shown by exception No. 3. The intention to convey the property to the separate use of the wife must be clear in order to exclude the marital rights of the husband. 1 Washburn on Real Property, pp. 330, 331 *et seq.*; *Tritt v. Colwell*, 31 Penn. 228; *Welsh v. Welsh*, 14 Ala. 76; *Fears v. Brooks*, 12 Ga. 195; *Carroll v. Lee*, 22 Am. Dec. 350; *Hamilton v. Bishop*, 29 Am. Dec. 101, and note 1.

4. Actual possession is a good defense in ejectment, regardless of any location, and recordation has nothing to do with such actual possession. Possession is the first step, recordation the second; and a patent the first step in the acquisition of title to placer mining ground.

KNOWLES & FORBIS, for respondents.

The first point involved is as to the admissibility of parol evidence to prove a conveyance of a mining claim, there being no written evidence of such conveyance. Under our statute a conveyance of real estate must be in writing. R. S. sec. 160, p. 435; sec. 212, p. 443; sec. 177, p. 437; sec. 178, p. 438.

Mining claims are real estate under our statute. R. S. subd. 5, sec. 145, p. 432; sec. 211, p. 443; sec. 176, p. 437.

Mining claims can only be conveyed by bill of sale or deed. *Barkley v. Tieleke*, 2 Mont. 59; *Hardenberg v. Bacon*, 33 Cal. 356-381; *Melton v. Lombard*, 51 Cal. 258; *Smith v. O'Hara*, 43 Cal. 371.

The authorities cited by appellant only apply when mining claims are considered merely as possessory rights, and nothing but possession passed. *Gatewood v. McLaughlin*, 23 Cal. 178; *Table Mt. Tunnel Co. v. Stranahan*, 20 Cal. 198.



The property was the separate property of Olive H. Hopkins, and Robert P. Hopkins was not a necessary party. R. S. sec. 7, p. 42; Moak's Van Santvoord's Pleading, 61; *Ackley v. Tarbox*, 31 N. Y. 664; *Palmer v. Davis*, 28 N. Y. 242.

Considering the property as common property, the allegations were sufficient, and state the facts exactly as they exist, and that is all that is necessary. R. S. sec. 83, p. 54; Bishop on Married Women, sec. 575.

There was no error in admitting the power of attorney and deeds executed by Denome; for, admitting that they were inadmissible, there was a deed in evidence executed by Hale to Olive H. Hopkins, conveying one undivided third interest in the Maria Louise lode (see pp. 30 and 48 of transcript). This at least made her a tenant in common, and as such she could maintain this action. *Trent v. Reilley*, 35 Cal. 129; *Williams v. Sutton*, 43 Cal. 65.

If defendants rely upon an equitable title, they must set up the facts constituting such equitable title in their pleadings. *McCauley v. Fuller*, 44 Cal. 356; *Tormey v. Frue*, 45 Cal. 105; *Kenyon v. Quinn*, 41 Cal. 325.

Defendants, by answering, waived all objections to plaintiffs' complaint, and by their answer put in issue the title of both plaintiffs. See p. 7 of transcript.

#### ADDITIONAL BRIEF OF RESPONDENTS.

First. The complaint shows the facts. Olive Hopkins is the name of the owner of the property. If Robert Hopkins has any rights, they arise from this fact of her ownership, and his ownership is cast upon him by law, and the allegation of her ownership raises an implication of his ownership. It is not proper to allege what arises as a legal conclusion from other facts alleged. Moak's Van Santvoord's Pl. 184-196; Pomeroy's Remedies, sec. 530.

There was sufficient in the complaint to show the title of Olive Hopkins. If there was not enough to show

Robert Hopkins' right, then we may consider the case as though a demurrer had been made to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action to him, and sustained. That being the case, we would have a defect in the parties plaintiff, which is a ground of demurrer. See sec. 85, R. S. of 1879.

If such a defect is not taken advantage of by demurrer, it is waived. *Moak's Van Santvoord's Pl.* 743; *Pomerooy's Rem. etc.* secs. 247-8; *Palmer v. Davis*, 28 N. Y. 242; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648.

As to whether or not the defendant should have been allowed to prove parol conveyances of placer mining claims, and whether or not it is not necessary that they should be evidenced by writing, is immaterial in this case.

The location of a parcel of ground for placer mining purposes gives the locator, at most, only a mining easement. This easement is confined to the purposes for which the ground is located, namely, the right to take out the gold contained in the deposits in the same.

The location of a parcel of ground for lode purposes is another easement, and a different one. Two easements for different purposes may exist in the same ground.

In the case of placer mining easement and a lode mining easement, when it comes to patenting the same, the placer mining claim must yield to the quartz or lode easement. See R. S. of the United States, sec. 2333.

#### APPELLANTS' BRIEF IN REPLY.

In the case of *Hardenberg v. Bacon*, 33 Cal., there was no pretense of transferring possession. *Melton v. Lombard*, 51 Cal., and *Goller v. Fett*, 30 Cal., were decided under a special statute.

The case of *Keney v. Consolidated Virginia*, 4 Saw. 385, is additional authority as to a parol conveyance,

accompanied with possession, being good to convey a mine.

There is no case presented in the record for an equitable defense. It is only a question of showing prior possession in appellants to defeat respondents' title.

WADE, C. J. This action grows out of a conflict between a placer location under the act of congress of July 26, 1866, and a quartz lode location under the act of May 10, 1872, and the plaintiffs bring the action under the statute to have determined the right to the possession of the ground in dispute. The defendants claimed title and the right of possession under a placer location, and on the trial offered to prove that the ground in question was located and recorded as a placer mining claim in the year 1866 in pursuance of the law and the local rules and regulations of the Summit Valley Mining District; that the parties who made the location immediately entered into the actual possession, and thereafter sold the ground to other parties and delivered the actual possession thereof to them; that such other parties, while in the actual possession, sold and delivered the same to defendants, who at once entered into the actual possession, and held such possession down to the date of the commencement of this action, but that none of said sales and transfers were by deed.

This testimony was excluded and error assigned.

1. Under this issue the question of actual possession was not very material. The inquiry being as to which of these parties had the right to possession, the presumption of ownership which accompanies possession did not arise. Possession by defendants was admitted, and issue was joined as to their right. The plaintiffs alleged that the defendants had forfeited their right to the possession by a failure to comply with the rules and regulations of the mining district in relation thereto, and that was the question to be tried. The defendants did not offer to



prove, and it did not appear, that they or their predecessors in interest held possession of the claim by virtue of a compliance with the local rules and regulations of the district in which the same was situated. Possession must be so held in order to carry with it a possessory title. Possession within a mining district, to be protected, or to give vitality to a title, must be in pursuance of the law and the local rules and regulations. Possession, in order to be available, must be properly supported. It must stand upon the law and be the result of a compliance therewith. Representation of a claim in the manner provided by the law, and the local rules and regulations of the mining district, is the life of the possessory title to such claim. Possession, without a location, carries no title. Possession under a location that has become dead by reason of non-representation, or a failure to comply with the local rules and customs, is equivalent to possession with no location at all. Therefore proof of the mere delivery of possession of a placer claim from one to another, from the date of location to the date of the adverse claim, whether such delivery was accompanied by a deed or otherwise, would be of little or no consequence. Such delivery would carry no title, unless the possession was supported by proof of a continued compliance with the law and the local rules and regulations, which alone gives vitality to the title by possession. Possessory titles do not live upon possession alone. They must be supported by proof of a compliance with the law that gives the right to and sustains the possession. The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location, made in pursuance of the law, and kept alive by a compliance therewith. Hence, we say that upon an issue joined as to the forfeiture of the right to the possession of a mining claim, by reason of failure in complying with the rules and regulations of the district as to representation, etc., proof of the actual

possession, or of the delivery of such possession from the date of the location to the trial of the issue, if unaccompanied by testimony showing that such possession was taken and held under and by virtue of a compliance with the local rules and regulations of the district, is immaterial proof.

2. The possessory title to a mining claim ought to be conveyed by deed. Such a title is real estate. It is a grant by the government to the locator of an interest in the public domain. *Robertson v. Smith*, 1 Mont. 414. A location as provided by law, and possession in compliance with the local rules and customs, gives to the locator such an interest in the ground located as that the government has no interest or estate therein that can be granted or conveyed to any other person, and in such a case the government holds the naked title in trust for the locator or his assigns.

Having heretofore held (*Robertson v. Smith, supra*) that the locator takes as by grant from the government, it necessarily follows that the thing granted is real estate. Personal property is not conveyed by grant. The term "grant" is only applicable to transfers of real property. 2 Washburn on Real Property, 517. If, then, the possessory interest of the defendants was an interest in real estate, it should have been conveyed by deed. Our statute provides (sec. 160, p. 435, R. S.) that no estate or interest in lands other than for leases for a term not exceeding one year shall be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same. And section 211, id., declares that "the term real estate, as used in this article, shall be construed as co-extensive in meaning with lands, tenements, hereditaments and possessory titles to the public lands in this territory."

Thus, by the very terms of the statute, the possessory

title of the defendants' predecessors was real estate, and should have been conveyed by deed. The California decisions referred to do not throw much light on this subject.

The case of *Table Mt. Tunnel Co. v. Stranahan*, 20 Cal. 198, holds that "rights resting upon possession *only*, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance other than by a transfer of possession is necessary to pass them." Of course, rights resting upon naked possession only could not be considered real estate. A mere trespasser might possess such rights. But it is a very different thing where possession is held by virtue of a location and representation, in pursuance of the local rules and regulations of a mining district. In such a case the possession is supported by a grant from the government, and the possessory title thereby acquired and held is, by the terms of our statute, declared to be real estate. The effect of this decision is that rights resting in possession, which do not amount to an interest in the land, are not within the statute of frauds. And, thus stated, the doctrine is always correct.

In the case of *Hardenbergh v. Bacon*, 33 Cal. 381, the following language is used: "In this state it has frequently been held that the title to a mining claim would pass by a verbal sale, accompanied by an actual transfer of the possession. *Table Mt. Tunnel Co. v. Stranahan*, 20 Cal. 198; *Gatewood v. McLaughlin*, 23 Cal. 178; *Patterson v. Keystone Co.* id. 576." It is impossible to reconcile those cases with the statute of frauds, except upon the ground taken in the leading case, that "rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance other than a transfer of possession is necessary to pass them." The doctrine of those cases, however, has no bearing when the interest held in the mining ground is considered as real estate. The declaration in *Mining*



*Co. v. Taylor*, 100 U. S. 42, that a written conveyance is not necessary to the transfer of a mining claim, is based upon the case of *The Table Mt. Tunnel Co. v. Stranahan*, *supra*, which case seems to have been overruled by the later case of *Hardenbergh v. Bacon*, *supra*, in the same state.

3. The original locators of the quartz lode claim described in the complaint conveyed the same to Olive H. Hopkins, the wife of Robert P. Hopkins, the plaintiff, and it is contended by the defendants that when real estate is conveyed to a wife, in the absence of words in the conveyance limiting the same to her sole and separate use, the property so conveyed, by operation of law, at once becomes the property of the husband, and therefore that the husband alone could bring this action. We know of no authority in the books to support the proposition. In the absence of any statutory provision regulating such conveyances, a conveyance of real property to a wife, containing no words limiting the conveyance to her sole and separate use, vests the property in her, and her husband is only entitled to the rents and profits thereof. 1 Wash. Real Prop. 312. These are among his marital rights, and if the wife forfeited the estate, his rights and interests therein would be defeated. If the intention is to cut off the marital rights of the husband, this intention must be so declared in the deed, by conveying the property to the sole and separate use of the wife. The intention must be clear in order to secure such separate use to the wife and to exclude the marital rights of the husband. 1 Washburn, Real Prop. 313-14, and authorities there cited. The marital rights of the husband do not swallow up or destroy the title of the wife, but are limited to the rents and profits, and these rights may be cut off and defeated by apt words in the conveyance declaring such intention.

4. The claim of plaintiff was located by Hale, La Blue and Forrest. Hale conveyed his undivided third interest

directly to Olive H. Hopkins, and La Blue and Forrest conveyed to her by attorney. The two last deeds are defectively executed, but there is no objection to the deed from Hale. So that Mrs. Hopkins either became the owner of the entire property, or the owner of one undivided third interest therein, and a tenant in common with La Blue and Forrest, in either of which events she and her husband could maintain this action. One of the incidents of tenancy in common is that each of the co-tenants is entitled to the exclusive possession of the entire property as against the whole world except his co-tenants. Therefore a co-tenant, in prosecuting or defending actions concerning the common property, may treat the same as his own as against every one except his co-tenant. *Trent v. Reiley*, 35 Cal. 129; *Williams v. Sutton*, 43 Cal. 65.

Judgment is affirmed, with costs.

*Judgment affirmed.*

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**LAMME, appellant, v. DODSON ET AL., respondents.**

**REAL ESTATE — Parol agreement to sell — What possession is a part performance — Adverse possession.**—The proof showed legal title in L. since October, 1871; that W. was occupant of premises before L. acquired title, and afterwards acknowledged L.'s title, and made parol agreement for purchase of premises to be paid for in specified work; that L. made demand for this work, but it never was performed by W., who was still in possession of the premises at the time of his death, in February, 1881.

In action by L. against W.'s executor and the executor's tenant for possession on ground of legal title, to which defendants pleaded adverse possession under statute of limitations, and plaintiff replied possession under parol agreement to purchase on conditions never performed:

*Held*, that it was error to charge jury to find for defendants by reason of adverse possession; the question of adverse possession should have been submitted to the jury; that a parol agreement for sale of real estate is void unless there is part performance, and that possession

of premises under a previous holding is not such part performance; that plaintiff was under no obligation to file as a claim against the estate the estimated value of the work that decedent was to perform in payment of the premises.

A party who desires to avail himself of an equitable title must plead it specially or will be excluded from giving evidence thereon. *Reece v. Roush*, 2 Mont., 590, considered and affirmed.

*Appeal from First District, Gallatin County.*

J. J. DAVIS, F. K. ARMSTRONG and E. W. & J. K. TOOLE, for appellants.

The action is ejectment, and the following are the issues made by the pleadings: The appellant alleges title in himself, demand of possession, and unlawful detention by the respondents. The answer admits the demand for possession, denies title in the appellant, and for *new matter* avers title by adverse possession, *no equitable title being set up or relied upon*. Appellants, in reply to this *new matter*, set up an oral contract to sell and convey to the predecessor in interest of defendants, Thomas Warfield, deceased, upon the condition precedent that he should erect one-half of a certain brick wall on adjoining property, owned by appellant, upon which he was about to erect a building, and that this was the character and condition of his possession.

The evidence shows that deceased was a tenant of appellant's at the time of the alleged oral contract. That there was, consequently, no change or delivery of possession under the contract; that not a cent of any consideration was paid, and that the only consideration upon which deceased was entitled to a deed or title was upon the performance of the condition precedent in the erection of the wall. That he never erected the wall, made any effort to do so or contributed one cent towards it. That even the cost of so building was not tendered by deceased or offered by the pleadings. In fact, the defendant has asked no benefit from the verbal agreement.



He stands on the statute of limitations and nothing else. The appellant shows a perfect legal title.

The case, therefore, stood thus in 1878: Appellant was and is the legal owner of the premises. He made a verbal agreement with deceased, who was in possession as tenant, to sell upon condition that he should build a certain brick wall; deceased failed to build it. Appellant duly demanded possession, which was refused. No possession changed or was delivered under this oral agreement; no part of any consideration was paid, and even the condition precedent upon which the verbal contract depended was not performed. Deceased never claimed in his own *right* exclusive of *any other*, but simply a contingent right upon building the wall. There is no conflict as to the facts of the case. 3 McLean, 457; Tyler on Eject. 216; 5 Wend. 26; 4 Binn. 77; 7 Serg. & Rawle, 297; *Heath v. Wallace*, 53 Cal. 436; 12 Nev. 393.

1st. The verbal agreement to sell, without payment of consideration or delivery of possession under it, was void. See Statutes, p. 000, sec. 000.

2d. Defendants should have pleaded and relied upon their equitable title, if they had any.

3d. The failure to perform the condition precedent, even if valid and in writing, defeated defendant's equitable title and deprived him of such a defense. *Bowen v. Irons*, 4 Am. Dec. 686; *Moore v. Skidmore*, 12 Am. Dec. 333; Tyler on Ejectment, p. 40, citing 47 Barb. 163; 3 id. 576; 7 id. 74; 34 id. 352; 21 Wend. 230; 1 Story's Equity Juris. sec. 736.

4th. Defendants have not pleaded, or relied upon, or proven a single equitable right, or done a single act that would not otherwise have been done, so far as the evidence shows, had the contract not been made.

It is useless, under the pleadings, as we view it, to discuss the contract at all, except in so far as it bears upon the case on account of the plea of the statute of limitation.

HENRY N. BLAKE, for respondents.

The following facts appear in the transcript: The action was commenced to recover the possession of real property. The complaint alleges that Lamme has been the owner of the property since October 6, 1871; that possession thereof was demanded June 9, 1881, of Dodson, and August 24, 1881, of Nevitt, and that the possession of said Dodson and Nevitt has been wrongful since the dates of said demands. Lamme bought the property of William H. Tracy, October 6, 1871, and entered into a contract in 1872 with Thomas B. Warfield to sell the same and execute a conveyance when Warfield should erect a brick wall for Lamme. Warfield, in 1872, tore down a log house on the land and erected the building which was thereon at the trial. Testimony of Dodson, Transcript, p. 33.

Warfield remained in the possession of the property until his death, February 13, 1881. Dodson, as the executor of the will of Warfield, took possession of the property, and the same was duly returned in the inventory of the estate of Warfield. Inventory, Transcript, p. 35.

Dodson has no interest in the property except that as such executor. Nevitt has no interest in said property except that of tenant of said Dodson, as such executor.

1. A formal delivery of the property to Warfield by Lamme was not necessary. Warfield was in the possession thereof when Lamme bought the same, and remained in the quiet possession until his death, about ten years. A delivery would be presumed from these facts. *Reece v. Roush*, 2 Mont. 593; *Love v. Watkins*, 40 Cal. 547.

2. No rent was ever demanded of Warfield by Lamme, and no rent was ever paid by Warfield. The relation between Lamme and Warfield was that of vendor and vendee, and not that of landlord and tenant. Testimony in Transcript.

3. The plaintiff in ejectment must show a right to the possession of the property, and proof of the legal title is insufficient. *Porter v. Garrissino*, 51 Cal. 559; *Meeks v. Kirby*, 47 Cal. 168; *Owen v. Fowler*, 24 Cal. 193; *Owen v. Morton*, id. 374; *Willis v. Wozencraft*, 22 Cal. 608-612.

4. Lamme commenced no action against Warfield. Dodson, as the executor, had possession of the property. Under the laws of the territory, Dodson, as the executor, was entitled to such possession until the estate of Warfield was settled, and the action of ejectment was brought prematurely. R. S. Mont.; Prob. Pr. Act, § 127; *Meeks v. Kirby*, 47 Cal. 168; *Chapman v. Hollister*, 42 Cal. 462.

5. The complaint does not allege that the claim of Lamme was ever presented to the executor, and thereby fails to state facts sufficient to constitute a cause of action. R. S.; Prob. Pr. Act, § 157, p. 268.

“No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor.” *Hentsch v. Porter*, 10 Cal. 559, 560.

Dodson testifies that Lamme has not presented any claim against the estate of Warfield to him as executor. Transcript, p. 33.

6. Lamme, in his complaint, relies wholly on his legal title, and cannot rely on an equitable title set forth in his replication. *Seaton v. Son*, 32 Cal. 481.

7. If, in ejectment, the answer is a general denial, the defendant may prove any fact tending to show that plaintiff had no right of action when the action was commenced. It was not necessary for Dodson to set up the character of the possession by Warfield under Lamme. *Semple v. Cook*, 50 Cal. 26.

8. Upon the failure of Warfield to pay for the wall referred to in the pleadings and evidence, after a demand therefor, Lamme had a claim for the cost of building such wall against Warfield and Dodson, as such executor,



and should have presented the same for payment. *Willis v. Wozencraft*, 22 Cal. 617.

9. The replication of Lamme and his evidence in rebuttal show that Dodson had the rightful possession of the property under the rules of law hereinbefore stated.

10. The removal of the log-house by Warfield, and the erection of the building by Warfield on the land, constituted, under the circumstances, an adverse possession within the meaning of the statutes of this territory. R. S.; Code Civ. Pr. §§ 29, 30, 31, 32, 36; *National Min. Co. v. Powers*, 3 Mont. 344, and cases there cited.

#### REPLY OF APPELLANTS.

We shall proceed in the examination of the questions involved in this case in the order in which they are presented by the record. In doing this we are led first to inquire into the issues that are tendered by the pleadings. In carrying into effect the object of our code practice, it is of the utmost importance to ascertain exactly what is alleged upon the one side and denied upon the other, and what, if any, affirmative facts are set up in the answer upon which a recovery could be had, or the action of the plaintiff thereby defeated, together with the issues tendered by the replication, upon this new or affirmative matter. It is a salutary and universal rule that the rights of litigants must be determined by the issues framed by their pleadings, and cannot be hypothecated upon something outside of them. It will be seen from the complaint in this case that the plaintiff in this action of ejectment has set up his legal title to the property, and seeks to recover upon it alone. The defendants in their answer deny the allegations of this complaint, with the exception of the demand for the possession of the property; whereby they put in issue this legal title of the plaintiff, and, as new or affirmative matter upon which they rely, set up the statute of limitation of this territory. The legal title thus denied, and the statute of limitation thus

pleaded, are the sole and only issues tendered by the defendant and upon which he can base his defense. They nowhere set up or rely upon an equitable defense, but content themselves by putting plaintiff to the proof of his legal title, and taking upon themselves the burthen of showing a title by adverse possession. Upon this new matter setting up the statute of limitation the plaintiff takes issue by denial, and unnecessarily sets up a certain oral agreement to show that the possession thus alleged to be held by defendants was not adverse or under claim of title exclusive of any other right, but that such claim was subject to, and in full recognition of, the right of plaintiff to the performance of a certain condition precedent, before it attached at all. Hence we say that the only issues upon which the respective parties must stand or fall are the legal title tendered by the plaintiff and the title under the statute of limitation presented by defendants.

Upon these issues we will first examine the propositions in this case, after which we will discuss it under the evidence presented by the record (and upon which there is no conflict), without reference to any pleadings whatever; involving in the one instance the strict legal title which is alone put in issue, and in the other a bare semblance of an equitable claim, based solely upon the evidence adduced on the trial, as explanatory of the character of the possession held by defendants. Upon these propositions we invite the attention of the court to the following points and authorities, which we earnestly insist are conclusive of this case:

1st. There being nothing but a legal title set up by plaintiff, upon it he must recover, if at all. The denial of such legal title puts it alone in issue, and admits of only such evidence on the part of defendants as would tend to defeat it or establish a better legal title in them. The equitable jurisdiction of the court is in nowise invoked by this part of the pleadings. See Remedies and

Remedial Rights, Pomeroy, p. 106 *et seq.*, and secs. 87, 90, 91 and 94; *Clarke v. Lockwood*, 21 Cal. 220.

2d. There never was a question but that an equitable defense, since the adoption of the code, which alone permitted such a defense to an action at law, in order to be available to defendant for any purpose, must be as fully pleaded as if presented by an original bill. The only question upon this subject in which the courts at all differed was upon the proposition whether the defendant could rely upon the facts thus pleaded as a negative defense, or whether he should ask and obtain affirmative relief. The legal title, according to an unbroken line of authorities, must prevail, unless an equitable one is pleaded and proven. *Cadiz v. Majors*, 33 Cal. 288; *Kenyon v. Quinn*, 41 Cal. 325; *Follett v. Heath*, 15 Wis. 601; *Congor v. Parker*, 29 Ind. 380; *Hecks v. Shepherd*, 4 Lansing, 325, 327; *Dobson v. Pecra*, 12 N. Y. 256; *Philips v. Gorham*, 17 N. Y. 270; *Lamme v. Kintzing*, 1 Mont. 290; 1 Van Santvoord's Pl. (Moak's ed.) 687.

And to the same effect, that an equitable defense in order to be available as a negative defense must be pleaded, is fully supported by Associate Justice Blake in a well considered opinion in the case of *Reece v. Roush*, cited by defendants' counsel (2 Mont. 590), in which he cites *Cadiz v. Majors*, 33 Cal., and *Kenyon v. Quinn*, 41 Cal. *supra*; also *McCaully v. Fullon*, 44 Cal. 362, and *Towney v. True*, 45 Cal. 105. See, also, *Myendorff v. Frohner*, 3 Mont. 282 *et seq.*

Hence we see that the only legitimate defense left under these pleadings is the adverse possession relied upon by defendants. The verdict and judgment, if plaintiff made out his legal title, must be based upon this defense alone, if defendants succeed at all. If, then, we show by the authorities that they cannot recover upon the uncontradicted facts established in this case, under this allegation of adverse possession, as we have shown that an equitable defense is unavailable unless pleaded



and proven, and that the legal title of plaintiff must prevail, then we say that there is nothing left of defendants' pretended claim, and this case should be reversed. The record unequivocally shows that the legal title is in the plaintiff. How, then, if at all, has he lost it? Defendants say by an open, notorious, hostile possession by them and deceased, under a claim of title exclusive of any other right for the full statutory period. This was a question of fact, and should have been submitted to the jury, which was not done. See Record, p. 43; see, also, Revised Statutes, p. 83, sec. 239; Angell on Limitations, p. 389, 4th ed.; *Jackson ex dem. Jadwin v. Joy*, 9 Johns. 112; *Beckman v. Stephens*, 13 Johns. 496; *Gayetty v. Bethume*, 14 Mass. 55; *Sparkeman v. Partee*, 1 Paine, 466; *McClung v. Rass*, 5 Wheat. 124; *Cummings v. Wyman*, 10 Mass. 468.

And if the judge assumes to direct the jury how to find, when there is a question as to whether the possession was adverse, a new trial will be ordered. This is just what the judge did in this case. *Jackson v. Jadwin*, 9 Johns. 102; *Runcom v. Dae*, 5 Barn. & Cress. 696; *Stephens v. Deming*, 2 Aiken, 112; *Pray v. Pierce*, 7 Mass. 383; *Helen's Lessee v. Howard*, 2 Har. & McH. 76. And see Adams on Ejectment (4th ed.), 600, 601.

But above and beyond all, the possession of defendants and the deceased, during his life-time, was not adverse. The statute of limitation was never set in motion. There never was any designed, in fact, or wrongful entry by any one claiming the freehold; no actual ouster or expulsion of the plaintiff, or any act tantamount thereto.

If this question, which was the only one left after plaintiff had shown his legal title from the United States down to him by proper conveyances, had been submitted to the jury, but one verdict could have been rendered, but one conclusion reached. The evidence, uncontradicted, unequivocally shows that the possession held was under a verbal contract to sell, dependent upon the sin-

gle condition precedent and solitary consideration that the deceased would construct a certain brick wall, which he never did.

This robbed his possession of its adverse character, defeated the only defense that was available, and entitled the plaintiff to recover. Here the defendants and their predecessors in interest were in possession and held it under an invalid contract, and one which would only be enforced in equity upon showing a full and complete compliance with all the conditions upon their part. It would be a monstrous doctrine to promulgate, that a person under an oral contract to purchase land while in possession of it could remain in default, by reason of which he was not entitled to recover in equity, set up his laches and possession as a defense, and thereby deprive the owner of the land of its purchase price. If he had an equitable claim to the land capable of being enforced, he should assert it in his pleading, rely upon and prove it at the trial.

The possession of defendants and their predecessors never could in any sense be regarded as adverse until default was made in the erection of the wall, which was a condition precedent to his acquisition of a title to it, if, indeed, it could even then be so considered. This was the very thing that the parties contracted for, the performance of which alone gave them a right to a deed. It was the only act or thing to be done, which formed the consideration upon which the oral contract depended; it was not performed, and cannot be supplied by the possession simply held during the continuance of the contract. Since the default in building the wall has occurred, up to the date of the bringing of this suit, the statutory time has not expired, even if the possession since that time is adverse, which we deny.

In the absence of the assertion of an equitable title, as in the case at law, it stands thus: A. contracts orally to sell to B. his farm for \$20,000. He agrees to pay for it

in five years, and is let into possession accordingly. At the end of this time he pleads the invalidity of the contract, repudiates the demand, and claims title under the statute of limitations.

Without a tender of the money he has no standing in a court of equity, and this occupancy, under an equitable title, will defeat the operation of the statute of limitations. Even if he enters and holds under a void contract to purchase, this will characterize his possession, destroy its adverse quality, and render him simply a tenant at will. For the present we will content ourselves by showing that a possession thus held is not adverse, and hereafter demonstrate conclusively by the authorities that, if this equitable title had been pleaded and relied upon, it is utterly unavailable. In support of the proposition that a possession held under a contract to purchase, whether void or valid, could not be made the foundation for the acquisition of a title while thus held, under the statute of limitation, we should refrain from the citation of authorities but for the position assumed by counsel for respondents. See Adams on Ejectment (4th ed.), 558, 559. In the case of *La Frambois v. Jackson ex dem. Smith et al.* 8 Cow. 589, 605, Golden, Senator, said: "I admit, also, that if an adverse possession be claimed under a grant or conveyance which never could have been the foundation of a good title, it cannot bar the recovery of one who shows a perfect title." Here the purchase money was not paid even under this version of the case. See Adams on Ejectment, 575 (4th ed.).

The color and claim of title must be a legal claim, and not an equitable claim, which was the only one ever asserted by the deceased. Such a claim is not adverse, and does not set the statute in motion. *Potter v. Sesson*, 2 Johns. Cas. 324; *Smith v. Pierce*, 2 Johns. 221; *id.* 84; 3 *id.* 422, 423; 8 *id.* 380; especially Adams on Ejectment (4th ed.), 575, and *Van Allen v. Rogers*, 1 Johns. Cas. 33.

When the proper distinction is made between cases



where a party claims absolutely under color of title, however defective, and under the owner upon a contract depending upon a contingency or condition precedent, which is the case at bar, there is no difficulty in reaching a correct conclusion. The following authorities are directly in point, and must forever settle the only remaining question legitimately in this case. See Angell on Limitations (4th ed.), p. 409, sec. 406; *Woods v. Bliss*, 11 Ohio, 455; *Brown v. King*, 5 Metc. (Mass.) 173.

Mr. Angell, in his work upon limitations (sec. 406, *supra*), in discussing this question, says: "But the case is different when one agrees to buy and another agrees to sell land, and no consideration is paid, and the party contracting to buy enters into possession, inasmuch as the fair inference there is that the entry and possession are in subordination to the title of the party contracting to sell until the stipulated payment is made; such a case therefore constitutes a tenancy at will." *Ball v. Cullemore*, 2 Crompt. M. & R. 120; *Doe v. Chamberlain*, 5 M. & W. 14; *Larnard v. Hudson*, 60 N. Y. 102; *In re Dept. of Pub. Parks*, 73 N. Y. 560.

All the witnesses concurred upon the one proposition that deceased acknowledged the title of the plaintiff, and only contemplated acquiring it by the construction of the wall referred to. And this is established as an undisputed fact in the case. He cannot, therefore, during the existence of this condition of affairs, be permitted to claim under the statute of limitations. Bigelow on Estoppel, p. 384; also p. 383 and note 2.

But, as we have said before, the oral contract set up in the replication, upon which there was proof, was deemed denied under sec. 239 and sec. 241, Revised Statutes of Montana. This put directly in issue the adverse possession of defendants and their predecessors in interest, and the question should have been left to the jury. See Angell on Limitations, 389, *supra*; Tyler on Ejectment, pp. 878, 879. See, also, 3 McLean, 457.

While we confidently assert and earnestly insist that the foregoing authorities conclusively settle this case in favor of appellants, we shall attempt to show the utter emptiness of the position of respondents had the oral contract proven been properly pleaded and relied upon.

Notwithstanding this contract is set up in the replication as a negative reply to the statute of limitation pleaded by defendants as their only defense, aside from the denial of plaintiff's legal title, the plaintiff can insist upon it for that purpose without being obnoxious as a departure, for the reason that it goes to fortify the original title alleged by the plaintiff in his complaint. However repugnant to every principle of pleadings, and subversive of our boldest conceptions of justice, it would be to admit defendants to avail themselves of the oral contract so set up, for the sole purpose mentioned, which is even deemed denied by them and not sought to be enforced by either, we must respectfully submit that it is wanting in every essential quality that would give it any standing in a court of equity.

Treating this contract, for the purposes of this argument, as a written and valid one, how, then, does the case stand? The deceased, at the time of the contract, was in possession as a tenant of plaintiff's grantor. No possession was, consequently, given or taken under the contract; no purchase money was paid, and the only condition upon which the deceased was to have a title was upon the construction of a certain brick wall. The legal title was to, and did, remain in plaintiff; the condition precedent upon which alone he was to be divested of this title never did occur. The plaintiff, while the deceased was thus in default, brings his action of ejectment. Even admitting, then, the validity of this contract, that it was properly pleaded, are defendants in a situation to enforce it? Being thus in default, we say not, and cite the court to the following authorities upon this point: The obligation to convey was at an end when deceased

made default in erecting, or assisting in erecting, this wall. It was not a condition to be satisfied in money. The parties have made their own contract, for reasons best known to themselves, and have made the construction of the wall the condition upon which alone the title was to pass. This court cannot satisfy this condition by the substitution of another and different one. It is time to specifically enforce such contracts when the party asking it has fully complied with its terms on his part, and his adversary is in default. Here he has not complied, and his adversary is not in default. It would be only to assume that plaintiff was not bound to convey, and yet could not recover; that he was bound by a contract, so far as he was concerned, that had been ignored by deceased and could not be enforced. He is entitled to recover in ejectment, even if this contract as proven was in writing, as required by our statute of frauds; and upon this proposition we cite the following authorities: Tyler on Ejectment, p. 40; 47 Barb. 163; 3 id. 576; 7 id. 74; 34 id. 352; 21 Wend. 230; 1 id. 418; 7 Cow. 747; 6 Wend. 228.

The defendants, in so far as this contract is concerned, become actors, or should be such, to avail themselves of it. They should have pleaded it as affirmative matter instead of denying it. Treating the proposition, however, as if they had so pleaded it, and what is their attitude in this case? They come into court and say, I made a contract with plaintiff by which I was to have a title to certain property upon building a certain wall. I have not built it, and here assert a title I was to have but never got. I ask the enforcement or benefit of the contract, notwithstanding that I am in default. The only thing that I obligated myself to do I have not done. I ask the court, according to my conceptions of equity, to treat that which I should have done as being done, that I may compel my adversary to do that which he is otherwise under no legal or moral obligation to do. Viewing this ques-



tion in its proper light as an oral contract, and how does it stand?

1st. It is void under our statute of frauds. See Revised Statutes of Montana, p. 435, sec. 160.

2d. There was no such part performance as in equity would take it out of the statute, even if it had been pleaded and relied upon. First, because the only single act of performance to be done or complied with on the part of deceased was the construction of the wall referred to, which was not done, attempted to be done, or any excuse offered whatever for such total failure. The presumptions are that he intended the legitimate consequences of his act, and was unwilling to construct it for the property he was to get, upon that sole contingency. In fact no reason is assigned, unless, forsooth, it may be inferred that he was financially unable to comply, which is no valid excuse in law or equity. Second, because he was in possession as tenant at the time of this oral contract, and no possession was delivered in pursuance of any of the terms of the contract. Third, even the possession thus held can by no means be construed as a delivery under the contract (as no reference is made to it in the contract proven); no consideration or any part of it was done or performed which, under all the authorities, was necessary to take the cause out of the statute. See Browne on Statute of Frauds (4th ed.), sec. 477; also sec. 472; *Jones v. Peter*, 3 Serg. & R. 543; Sugden on Vendors and Purchasers, 141; *Eckhart v. Eckhart*, 3 Penn. 332; 27 Penn. 176.

But it is claimed that the deceased tore down one house and erected another upon the premises. This might have given him an equitable right to have performed or offered to perform the verbal condition on his part, but did not relieve him from so doing.

It must appear that in good faith, and at the proper time, he has performed the obligations which devolved upon him in order to take the case out of the statute of

frauds. *Beckwith v. Kounts*, 6 B. Mon. (Ky.) 222; *Garnet v. Macon*, 6 Cal. 308.

A verbal contract within the statute of frauds is void, whether sought to be enforced by action or made available as a defense. Browne on Statute of Frauds (4th ed.), secs. 122, 131, 136.

He had possession of the property for years. In such case his improvements, under our statute and the authorities, are unavailing except as an offset for use and occupation. See *Wack v. Sorber*, 2 Whart. 387. There might be some reason in the position that the improvements gave a claim (if it can be said there were any such, the comparative value of the houses not being shown), if plaintiff had practiced a wrong or fraud in the premises, but as it is, deceased was at liberty to comply, if he saw proper to do so, and get his title. It is sufficient to say that all we know of such improvements was the loose remark of the defendant Dodson, dropped during the trial of the case, while upon the stand as a witness.

As to this kind of an equity, which comes more properly under the head of an *estoppel in pais*, it must be alleged and proven, first, that he was induced to make them on account of the contract, but for which it would not have been done; and second, that it would be a fraud upon his rights not to permit him to avail himself of them. As to the first proposition, there is no pleading and evidence to support it; and upon the second it is fair to say he could have constructed the wall and acquired his title, but did not; he is in default, and is the factor of his own situation. Strange, indeed, that he could claim that there would be any fraud upon his rights under such circumstances. He could recover their value if made in good faith, or set off the same against the use of the property. See Browne on Statute of Frauds (4th ed.), sec. 122 *et seq.* This, it must be assumed, he intended should be the result, otherwise he would have performed or offered to perform the condition precedent on his part.

Hilliard on Vendors, vol. 2, p. 312. Especially see *Dennison v. Coquillard*, 5 McLean, 253.

It is, however, also claimed by respondents' counsel that we should have presented and proven up our claim against the estate before he was entitled to maintain an action for the possession of this property, and argues that, by reason of the failure to aver these facts, the complaint does not state facts sufficient to constitute a cause of action. From the many absurd propositions contained in respondents' brief, when applied to the pleadings and facts in this case, we cannot say that we are surprised that his counsel has fallen into so plain and palpable an error as this. In support of this position he cites us to sections 157 and 268, Probate Practice Act, which reads as follows: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor." He fails to refer to the other sections of the statute applicable to these claims, and which must be construed in connection with the section above quoted. One of these provisions reads as follows: "Sec. 151. Every claim which is due when presented to the administrator must be supported by the affidavit of the claimant, or some one on his behalf, that the amount is justly due, and that no payments have been made thereon which are not credited, and that there are no set-offs to the same to the knowledge of claimant or affiant." This and similar provisions of the statute, aside from the potent and overwhelming reasons for it, show conclusively that the claim referred to has reference to a money demand, and has no application whatever to an action for the possession of real property. In this connection we are also referred to the case of *Hentsch v. Porter*, 10 Cal. 559, 560. By an examination of this case it will be seen that it fully sustains the position we have taken. The claim in question was a money demand. The statute referred to has a similar provision to our own in so far as the affidavit to



the claim is concerned. The only question is, does it refer to an action of ejectment or to a money demand? Bennett, Judge, in delivering the opinion of the court, says: "The claimant must present his claim properly verified, that the administrator and probate judge may determine whether they will allow or reject the claim. If the claimant does not thus present his claim, he cannot maintain an action thereon against the administrator." Under these provisions of the code and this decision, no one could doubt that a money demand should be presented, and that a failure to do so, with the proper affidavit appended, would be fatal to his action in the district court. But upon principle, the authority cited and the statute referred to, we deny its applicability to the case at bar. We are utterly at a loss, from the record in this case, to know upon what proposition the court instructed the jury to find for the defendants. As the plaintiff, however, has sustained his title in every respect by pleadings and proof, we are led to believe that this is the only ground upon which it rested, and have consequently given it more consideration than we otherwise would have done. The complaint states all that is necessary in an action of ejectment. The instruction of the court to find a verdict in this way, without an intimation upon what grounds it is done, is a practice to which we cannot subscribe. Judges are not infallible, and may leave skilled attorneys groping in darkness in an unsuccessful effort to find some reason or grounds for such a ruling, and ultimately leave the rights of his client enveloped in the silence and mystery of eternal night. If there had been a motion for non-suit, the grounds upon which it was based should be specifically stated and all others would have been waived. This principle is equally applicable when the court assumes to direct the jury in whose favor to render a verdict. See *Brown v. Warner et al.* 16 Nev. 228 *et seq.*

Again, we are told by counsel for respondents that the

administrator of this estate is entitled to the possession of this property until the estate is finally settled up and an order of distribution is had, and that the action of ejectment in this case is consequently premature. To support this position, he cites the court to section 127, Probate Practice Act; *Meeks v. Kerby*, 47 Cal. 167, and *Chapman v. Hollister*, 42 Cal. 462. Were we not from long and familiar acquaintance with counsel convinced of his fidelity to the court in which he practices, we should certainly question his sincerity in assuming that the section of the statute and authorities cited have any bearing whatever upon the questions involved in this case. The provision of the statute referred to reads as follows: "Sec. 127. The executor or administrator is entitled to the possession of the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled or until delivered over by order of the probate court to the heirs or devisees, and must keep in good tenantable repair all houses, buildings and fixtures thereon which are under his control."

It is too plain to admit of any doubt that this section applies to property belonging to the estate of the decedent and not to property of a third person which he may have in his possession at the time of his decease. It cannot well be seriously contended that the legislative assembly intended that the executor or administrator should wrongfully hold and repair the property of a stranger during the course of administration. Such is not the language or intent of the law. It refers to the estate of the decedent and none other.

In actions involving the right of possession to real property, the administrator under this section may properly defend, because the right of possession of this class of property is vested in him. The action of ejectment must be brought against the party in possession, regardless of the character or right under which he holds. It affords a remedy to the owner and a protection to the

his receiving great bodily harm; and then he can only use force sufficient to protect himself from the danger.

The judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

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CARLAND, appellant, v. COMMISSIONERS OF CUSTER COUNTY, respondent.

**PUBLIC OFFICERS**—*Title to office cannot be collaterally attacked.*—When a person is acting as a public officer under the apparent authority of an act of the legislature, his title to the office cannot be collaterally attacked.

**REMOVAL OF COUNTY TREASURER**—*When authorized.*—The board of county commissioners of Custer county has power to declare vacant the office of county treasurer, upon the failure of such officer to file his official bond in the manner required by law, or when it appeared that the books of such office did not show the actual condition of the office, or that certain funds of the county had been diverted from their proper channel, and unlawfully paid out, or that there had been culpable negligence in the care and keeping of public moneys.

**BOND OF COUNTY TREASURER.**—Section 433, rather than section 457, Revised Statutes of Montana, controls in the matter of the bond of the county treasurer, as more specific and in accord with public policy.

**TERMS OF DISTRICT COURT.**—When a court is held in any county of the territory, by an order of the supreme court, by any of the judges thereof, their proceedings are regular and valid.

*Appeal from First District, Custer County.*

CHUMASERO & CHADWICK, for appellant.

Plaintiff, on the 12th day of April, 1883, filed in the district court of Custer county his petition for a writ of *certiorari*, praying for the review and annulment of an order passed by the defendants, removing him from the office of treasurer of Custer county, to which he had been duly elected at a general election held November 7, 1882.

The petition set forth the fact of such election, and the qualification of plaintiff, and the filing of the bond then



rights by adverse possession, which we have shown exist only in the imagination of counsel.

It is also asserted that plaintiff cannot recover upon the equitable title set up in his replication, but must prevail, if at all, upon the legal title set up in his complaint. This is undoubtedly true; but that he seeks to so recover is utterly without foundation. It was pleaded as new matter, as a negative defense to the statute of limitation pleaded by defendants in their answer, to rebut the allegation that their possession was adverse, and thereby enable plaintiff to recover upon the legal title alleged in his complaint. It would be an anomaly in practice if a defendant could set up new matter in his answer required to be met by plaintiff in his reply, and yet that he could not so meet it without subjecting his pleading to the infirmities of a departure.

This suggestion of counsel leads us to examine into the true situation of this case and the inextricable dilemma in which these pleadings place him. It is too clear that the proof has failed to sustain their plea of adverse possession, leaving the plaintiff's legal title to prevail. Besides, if there was anything in it, it is too late after verdict, and not the proper way to take advantage of it. See 1 Van Santvoord's Pleadings, 635 *et seq.*

There is nothing left upon which they can base a recovery except upon the verbal contract set up by plaintiff in his replication solely as a negative defense to this plea of adverse possession, which under the statute is deemed to be denied by the defendants. Would it not be a remarkable epoch in the history of pleadings when a defendant who denies the existence of a contract, whereby he is estopped, whatever the evidence may be, is permitted to recover upon an equitable defense set up in the replication of the plaintiff to negative the claim of adverse possession?

How could defendants meet this issue? To avoid the denial created by the statute he would have to come in

and admit it, and ask the benefit of such allegation, and hypothecate his right upon a pleading unknown to and not recognized by our system of practice. This, it is clear, could not be done. They are forced to stand or fall upon the decisions cited in the former part of this brief,—that the defendant, to avail himself of an equitable defense, must plead and prove it. There is no dodging this proposition. If there was any way by which defendants could use the pleading and proof of this oral contract, it would show that they had no claim under the statute of limitation, as we have demonstrated by the authorities, and that they, and not defendant, were in default, and were consequently without any remedy to enforce this verbal contract. And it is a universal rule in cases like the present, that when a contract is not capable of being enforced by specific performance for want of equity, or by reason of its own infirmity, it is also not available as a defense. *Finch v. Finch*, 10 Ohio St. 507, 508; *Comes v. Lamson*, 16 Conn. 246; *Browne on Statute of Frauds* (4th ed.), sec. 131 *et seq.*

Counsel for respondents seem as much at a loss as ourselves as to the grounds upon which the court, under the pleadings and proof in this case, directed the jury to find for defendants. Claiming that the tearing down of one building and the erection of another in its stead gave defendants' predecessor in interest a right to disregard the contract and yet insist upon its fulfilment, to which we have heretofore referred, they also insist that this act constituted an adverse possession. The authorities we have cited are unequivocally to the effect that it, the *quo animo*, determines whether or not the possession is adverse, and that if the property was held under a contract to purchase, it could not be so construed. Besides, all the proof shows that deceased claimed no right whatever to the property in dispute except upon complying with the only condition upon his part in the construction of the wall. All the evidence points to this fact, and if there could

have been any question about it, it should have been left to the jury.

There is but one other proposition in this case, which is barely mentioned in the brief of counsel for respondents. It is intimated that if plaintiff has any claim, it is for money laid out and expended for the use of deceased, which, if true, as we have seen, should have been presented and proven up against the estate. It will be observed at once that this depends solely upon the validity of the oral contract referred to. It is true that under certain circumstances a party may perform all the obligations on his part, and thus acquire such an equity as would enable him in a court of chancery to rely upon and enforce the contract which at law was invalid. It is the first time, however, we have heard the doctrine advanced that the party to a void contract could perform the obligation of the other contracting party, and thereby give it validity and enforce it against him; and yet this is exactly what is asked of appellant in this case. Respondent insists that under an oral contract to purchase this land, and acquire a title upon the performance of a single condition precedent (not involving the bare payment of money), but serves in a particular capacity and in reference to a particular matter, that the appellant could have it performed for him, and enforce a contract that would under the statute of frauds otherwise be void. This position, if sustained, would subvert the whole theory upon which these statutes rest, open up at once the gates to fraud and perjury, and render the title to this character of property, which it was intended to fortify, loose, uncertain and insecure.

But, above all, suppose appellant should have presented this claim with the affidavit, as required by the statute; what then might have been the result? He could not enforce it. The contract was void as to both parties, and either could avail himself of its infirmities. The administrator might well say, there was no express promise



or request made of you to do this work, and all the implication is to the contrary. If the deceased had intended you should have built this wall, he would have in some way signified such intention. On the contrary, he was only to have a title to this land upon the construction of this wall, which he could have done or not, at his option. He chose not to erect it, and the presumptions are that he did not intend it should have been done; there is, consequently, no implied promise to pay you for it. Deceased was in possession as a tenant when this naked verbal contract was made; hence there was no delivery of possession in accordance with that contract. It is referable, therefore, to the tenancy and not the contract. See Browne on Statute of Frauds (4th ed.), sec. 477, and authorities cited in note; also sections 131, 134, 136; *Davis v. Farr*, 26 Vt. 592; *Pierpont v. Brainard*, 5 Barb. (N. Y.) 364.

There being no actual delivery of possession under the contract, or by any of its terms, and no consideration paid, it was void under the statute of frauds. The deceased refused to erect this wall, which at his option he might have done and obtained a title to the property in dispute. He was under no legal obligation to do so. You have voluntarily taken upon yourself to build it, and there is consequently no express or implied promise to pay you for it. This would be a complete answer to such a claim. It demonstrates conclusively the want of mutuality or binding force of the contract, and forcibly suggests the patent fact that plaintiff has pursued his only available remedy, and ought to recover.

The fact that counsel for respondent have presented many propositions by their lengthy brief in this case, which can have no bearing on it, has occasioned an examination of the pleadings, trial and evidence to a much greater extent than we otherwise should have done. Seeing a possibility of the court being misled by statements of abstract propositions of law by counsel, and believing

that there was error in the rulings of the court below by which the property of one person has been wrongfully appropriated to another, and realizing the disastrous consequences to all the parties in interest which would result from a protracted litigation, we have felt it our duty to relieve the court as much as possible of this labor, and demonstrated to the best of our ability the utter inapplicability of these authorities when considered in connection with the record in this case, as well as the fallacy of the defense interposed, at the expense even of exposing ourselves to the imputation of being tedious and prolix.

GALBRAITH, J. The complaint in this action alleges title in the appellant to the piece of ground in controversy from and after the 6th day of October, 1871; a wrongful and unlawful possession of the same by the respondents since the 9th day of June, 1881; that, on the 9th day of June, 1881, appellant demanded the possession thereof of the said Dodson, which was, and still is, refused; that since about the 20th day of June, 1881, the respondent Nevitt, in conjunction with Dodson, has been in the wrongful and unlawful possession of the premises; and that, on the 24th day of August, 1881, the appellant demanded possession of Nevitt also, which was, and still is, by him refused; that respondents still continue to withhold the possession of the premises from the appellant.

There were separate answers by the respondents, each answer denying specifically each of the above allegations of the complaint, except that of the demand of the possession of the premises, and the refusal thereof by each of the respondents. And they allege affirmatively that respondent Dodson, as the duly appointed and qualified executor of the last will and testament of Thomas B. Warfield, who died on or about the 13th day of February, 1881, took possession and charge of the above premises as a part of the property of the estate of said Warfield, deceased, and has continued to control and manage the

same as such executor, and that he has no other interest of any kind whatever in the premises; that Thomas B. Warfield, in his life-time, and respondent Dodson, as executor, etc., have been in the open, notorious and uninterrupted adverse possession of the premises for five years immediately preceding the bringing of this action; and that the right of action of the appellant is barred by the statute of limitations. The answer of Nevitt specifically denies the allegations of the complaint, and avers that, since the 20th of June, 1881, he has been in possession of the premises only as the tenant of respondent Dodson, acting executor, etc., of Thomas B. Warfield, deceased.

The replication, replying to answer of Dodson, denies that he took possession or charge of the premises as part of the estate of Thomas B. Warfield, deceased, or continues to control or manage the same as such executor; and also denies that the right of action is barred by the statute of limitations.

The appellant alleges affirmatively that in May, 1872, the said Warfield entered into a parol contract with appellant for the purchase of the premises, by which he agreed to build a brick wall for appellant, whenever demanded by him, upon and along the western boundary line of the premises, sufficient to serve "for the eastern wall of a building which appellant then intended to erect, and did subsequently erect," upon the adjoining premises on the west; and that no right or title should accrue to the said premises to the said Warfield until the performance of this agreement by him; in consideration whereof the appellant agreed that, upon the performance by Warfield of his promise, the appellant would sell and convey to him the premises in controversy; that Warfield occupied the premises by virtue of this agreement, and not otherwise; that in April, 1880, and at other times thereafter, appellant demanded of Warfield the performance of his part of the agreement, which Warfield never fulfilled.



The transcript contains a full statement of the evidence, which establishes the following facts: That the appellant obtained the title in fee simple to the premises in controversy on the 6th day of October, 1871, at and prior to the purchase of the property by the appellant. Warfield had been the tenant of the premises to Tracy, who was the appellant's grantor. That Warfield admitted to a witness demanding rent of him, as the attorney of Tracy, for a house which then stood on the premises and was occupied by Warfield (the witness thinks in 1872), "that he would pay no rent to Tracy, and that Lamme was the person to whom he was to pay rent;" "that he was not obliged to pay rent for that year to Tracy, but to Lamme." That there was a parol agreement between the appellant and Warfield that he, Warfield, would erect a brick wall for the appellant on the west side of the premises in controversy, upon the completion of which the appellant was to sell him the premises and make him a conveyance for the same. That about the year 1880 the appellant demanded of Warfield the fulfilment of the above agreement. That Warfield never fulfilled the agreement with appellant, nor performed any part thereof. That Dodson is the duly appointed and qualified executor of the last will and testament of Thomas B. Warfield. That appellant has presented no claim or demand against the estate of said Warfield to the executor. That in 1872 the said Warfield tore down and removed the building then on the premises, which had been thereon in 1871, and erected another house on the ground. That Warfield remained in possession of the premises until his death, viz., February 13, 1881. That said executor, as such, took possession of the premises and rented the same to Nevitt. That the premises were appraised as a part of the property of the estate of Thomas B. Warfield, on January 24, 1881, and are mentioned in an inventory of the estate.

After hearing the testimony, the court, on its own

motion, instructed the jury to find a verdict in favor of the respondent. The jury returned a verdict for respondent accordingly, and judgment was rendered thereon.

We will consider first the reasons urged by the respondents to sustain this action of the court. It is claimed that "the plaintiff in ejectment must show a right to the possession of the property, and proof of the legal title is not sufficient." The cases cited by the respondents do not maintain this position. It is a fundamental principle of the law in relation to real estate, that "when there is no adverse holding, the possession follows the property in the land, and is in him who has the title." Washburn on Real Prop. vol. 3, p. 118, citing *Holly v. Hawley*, 39 Vermont. The law of this territory provides that "in every action for the recovery of real property, or the possession thereof, the person establishing a legal title to property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the property has been held and possessed adversely to such legal title for five years before the commencement of the action." The true principle, therefore, is that he who has the legal title to real property is presumed to have the right to the possession thereof until better right is shown.

It is claimed by the respondent that the action of the appellant was brought prematurely for the reason that, having commenced no action against Warfield, the executor, Dodson, had obtained possession of the property under the laws of the territory, and was entitled to continue in such possession until the estate was settled, referring to section 127 of the Probate Practice Act. But to assert that the premises in controversy are a part of the estate of Warfield, deceased, is itself begging the question at issue. The mere fact that an executor claims that property as a part of decedent's estate, and includes it in

his inventory of such estate, does not make it so in fact. The appellant alleges this property to be his own, and therefore that it is not any part of the property of the estate of Warfield. To say that property, by being mentioned in the inventory of a decedent's estate taken possession of by an executor, and claimed as part thereof by him, is thereby conclusively presumed to be a part of such estate until the same is settled by an executor or administrator, would be productive of serious mischief, and we will not place such a construction upon this section of the probate act.

The cases referred to by respondents to maintain the position (*Meeks v. Kirby*, 47 Cal. 168, and *Chapman v. Hollister*, 42 Cal. 462) are only to the effect that an heir or devisee, or their grantees, are not entitled to the possession of their share of the decedent's estate, and cannot maintain ejectment therefor until the administration of the estate is closed, and were rendered in view of the same or similar provisions of the Probate Practice Act of that state. The reasons are evident; for in addition to the express provisions of the statute, to permit the heirs or devisees to take possession of the estate before its settlement, "would tend to confusion, delay and embarrassment in the administration." But we think that neither the law itself, nor the reasons above given, apply to a case where the claim is by one not bearing such a relation to the estate, and who claims the property as his own, and impliedly denies that it is part of decedent's estate. The respondents argue that it was necessary for appellant to aver and prove that he had presented a claim for the premises to the executor in order to maintain his action, by reason of the provisions of the law, "that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor." Sec. 167, Probate Practice Act, Rev. Stat. And the kind of claim intended by this provision is doubtless one which exists by reason of the



holder of such claim being a creditor of the estate. The entire article of which this chapter is part, "Article 1, chapter 6, of the Probate Practice Act," treats of this class of claims, and it is a claim of this character arising upon a contract express or implied, and not a claim of title to real estate, which is intended by this provision.

The responder ts attempt to maintain that as the appellant "in his complaint relies wholly upon his legal title," he cannot rely upon an equitable title set forth in his replication. What relation the allegation contained in the replication, and evidence thereof, bear to the case, we will consider hereafter.

The complaint states a good cause of action by averring the legal title to be in himself, the appellant. The answer denies the legal title, and sets up the statute of limitations. The replication denies the affirmative allegations of the answer, and alleges the parol agreement affirmatively, in reply to the new matter set up in the answer. This is intended to be matter in avoidance, and is deemed "controverted on the trial by the adverse party." Sections 107 and 239 of the Code of Civil Procedure, R. S. pp. 59-83. The parol agreement set forth in the replication is made in reply to the claim of the statute of limitations, contained in the answer. It is intended to rebut the allegation of the answer, that the possession of the respondents was adverse. It is deemed to be denied without further pleading. The appellant by setting up this matter does not assume to rely upon this allegation, or abandon his claim to recover upon the legal title. Such matter, set forth in a replication rendered necessary by the answer, is not a departure in pleading. It is claimed by respondents that "if in ejectment the answer is a general denial, the defendant may prove any fact tending to show that plaintiff had no right of action when the action was commenced," and that it was not necessary for Dodson to set up the character of the possession by Warfield under Lamme. As a legal proposition this is

true in relation to any facts which respondents might have offered to prove, tending to disprove the legal title of the appellant, or tending to establish a better legal title in themselves. But the respondents did not allege any equitable defense, relying wholly upon their denial of the legal title of the appellant and the statute of limitations, and therefore could not offer proof tending to establish an equitable defense upon the trial. The rule is well established and recognized by the decisions of this court, that if a defendant desires to avail himself of his equitable title, he should plead it and ask the appropriate relief. When he has not done so, he is not entitled to give it in evidence. *Kenyon v. Quinn*, 41 Cal. 325; *Cadiz v. Major*, 33 Cal. 288; *Reece v. Roush*, 2 Mont. 590.

The respondents contend that, "after the failure of Warfield to pay for the wall referred to, and after a demand therefor, Lamme had a claim for the cost of the building of such wall against Warfield, and Dodson as such executor, and should have prosecuted the same for payment." The allegations may be briefly stated thus: A legal title alleged in the complaint, which is denied in the answer, and the statute of limitations averred by reason of an adverse possession which has its inception from a parol agreement not alleged in the answer, but only in the replication, and which the law presumes the respondents to deny.

We do not think that in this case, in this condition of the pleadings, the respondents can claim that the appellant should be required to recognize an agreement which they do not allege in the answer, and which they are presumed to deny. We will consider this claim further on in this opinion.

It is claimed by respondents that "the removal of the log house by Warfield, and the erection of a building by Warfield on the land, constitutes under the circumstances an adverse possession within the meaning of the statutes of this territory."

The circumstances of the case cited to maintain this position, viz., *Nat. Mining Co. v. Power*, 3 Mont. 344, are in no wise similar to the circumstances of the case at bar. In that case the person claiming title by adverse possession had purchased from a stranger a dwelling-house and other buildings which were upon the land of the plaintiff, and inclosed the buildings with a good and substantial fence, and resided on the tract thus inclosed for about four years. Under the laws of the territory at that time, three years' adverse possession established a title. The plaintiff's legal title was obtained in 1869. It was established on the trial that the defendant always claimed to be the owner of the property, and that the agent of the plaintiff did not know that she made this claim, although he knew that she built the fence and occupied the premises for the above period. It will be observed that the possession of the defendant had no connection with plaintiff's title and was hostile in its origin, continuing to be so during the entire above-named period. In the case at bar, even granting that the parol agreement had been properly alleged and proved by Warfield, yet his possession was not hostile in its inception, for he was the tenant of appellant when the latter obtained the legal title, and by the parol agreement he recognized the appellant's title, and must necessarily have claimed under it and not in hostility thereto. The evidence does not disclose whether or not Warfield removed the house and built another, before or after the parol agreement, or with or without the consent of the appellant. The circumstances of the case repel the presumption that these acts of Warfield were done in view of asserting or holding adverse possession of the premises. The question of adverse possession is one of intention. The intention must be discovered from all the circumstances of the case. This brings us to the question as to whether or not the possession of Warfield was adverse. The parol agreement was void under the statute of frauds



unless there was such a delivery of possession, or part performance, as took it out of the statute. There was no such delivery of possession in this case. Warfield was in possession of the premises when the parol agreement was made, and there was no delivery to or assumption of possession by Warfield under the agreement. Browne on the Statute of Frauds, under the head of "Verbal contracts enforced in equity," sections 472, 476, 477, contains the following language: "In all cases in which possession, either as delivered by the vendor or as assumed by the purchaser, is relied upon, it must appear to be a notorious and exclusive possession of the land claimed and to have been delivered or assumed in pursuance of the contract alleged." "The possession must appear to have been delivered or assumed in pursuance of the contract alleged. Thus it is abundantly settled, that if one who is already in possession of land as tenant verbally contract with the owner for a new term, his merely continuing in possession after the making of the alleged contract is not an act of taking possession within the meaning of the rule so as to justify a decree for a lease according to the contract." "The same reasoning applies, of course, when the contract set up is the sale of the estate to the defendant by the owner of the fee. And in like manner, when the tenant's old term has expired and he holds over, such holding will not be decreed an act of part performance of an alleged contract for the purchase of the estate, but is more naturally referable to his landlord's permission to continue in possession upon the terms of the old holding."

In the case of *Jones v. Peterman*, 3 Serg. & R. 543, it was held that "possession had before a parol agreement of a lease for seven years, and continued afterwards, is of too doubtful a nature to be construed as part performance, and to take the case out of the act for the prevention of frauds and perjuries." In rendering the opinion, Tilghman, C. J., said: "A lessee who contin

ues in possession after the expiration of his lease may be supposed to retain the possession by permission of the landlord. It would not be sufficient evidence of part performance of agreement to purchase the land, or of a new lease for more than a year." "In the present case, it is stated that Perkins, under whom defendants claim, was in possession prior to the agreement now sought to be established. Possession, therefore, was not delivered in pursuance of the agreement, and is not to be considered as part performance." Gibson, J., rendering an opinion in the same case, said: "It is fully settled that a bare holding over is not a possession under a new agreement to take a case out of the statute."

There was no part performance of the parol agreement which would take it out of the statute of frauds. It is perhaps needless to say that the evidence in relation to Warfield's having had estimates made of the cost of the wall is not a part performance of the parol agreement. The respondents do not claim anything in the argument by reason of the tearing down of the log building and erecting another, of which there is a bare mention in the testimony of Dodson, as witness for respondents except as these acts tended to show adverse possession. They are not claimed as valuable improvements. There is no evidence which would show that they were of such a character, or that it would work a fraud upon the respondents, if the appellant failed to perform the agreement. Even if such had been proved to be the case, before equity would decree a specific performance of the contract on the ground of valuable improvements, Warfield or the respondents must first have performed, or offered to perform, their part of the agreement. The parol agreement was void under the statute of frauds. Sec. 160 of the General Laws, Rev. Stat. p. 435.

The agreement being void, even if properly averred and proved, was utterly powerless to set in motion the statute of limitations. Being in possession as tenant

when the appellant acquired the legal title, and having been the tenant also of the appellant, his possession after the parol agreement was not an adverse or hostile possession, for in such a case he will be presumed to retain possession by permission of his landlord. The evidence shows that Warfield admitted and recognized the title of the appellant, and expected to acquire it only by a compliance with the agreement.

“Where one entered in subservience to the title of the real owner there must be a clear, positive and continued disclaimer and disavowal of the title under which he entered and an assertion of an adverse right brought home to the owner, in order to lay a foundation for the operation of the statute of limitations.” 3 Washburn on Real Property, sec. 23. But even granting that the agreement was a valid one and properly alleged and proved, still the possession was not adverse until the condition precedent was performed. The authorities upon this point are clear and conclusive. In *The Matter of the Department of Parks*, 73 N. Y. 560, Earl, J., says: “It is too well settled to be disputed that one who enters upon land under a mere agreement to purchase does not hold adversely as against the vendor until his agreement has been fully performed, so that he has become entitled to a conveyance.”

Angell on Limitations, sec. 406, contains the following language: “But the case is different when one agrees to buy and another to sell land, and no consideration is paid, and the party contracting to buy enters into possession, inasmuch as the fair inference there is that the entry and possession are in subordination to the title of the party contracting to sell until the stipulated payment is made. Such a case, therefore, constitutes a tenancy at will.”

In *Woods et al. v. Dille et al.* 11 Ohio, 455, it was held that “possession obtained under a contract of purchase does not become adverse while the contract is acted upon and payment made.” There is stronger reason to sup-



port this proposition when the contract was not acted upon and no attempt made to comply therewith.

In *Brown v. King*, 5 Metcalf, 173, Wilde, J., said: "Where one agreed to buy and another to sell land, and no consideration was paid and no deed given, and the buyer entered into possession, the fair inference is that the entry and possession are not adverse and a disseizin, but by consent of the owner and in subordination to his title until payment is made and a deed given, and constitutes a tenancy at will."

Under the circumstances of this case, granting the contract to have been properly pleaded and a valid one, Warfield must be presumed to have held possession by permission of the appellant, and in such a case, "without the reservation of any rent, he is by implication of law a tenant at will." *Larned v. Hudson*, 60 N. Y. 102.

Therefore under any view of the case the possession of Warfield and the respondents was not adverse, and the allegation that the right of action is barred by the statute of limitations is not sustained. For the reason before given, that the respondents are presumed to deny the parol agreement, and also for the reason that the same is void, the appellant cannot maintain an action against the executor for the price of the wall. When an agreement is void, one of the parties cannot perform the obligation of the other, so as to render him liable therefor. This would be to give force and vitality to a contract which is absolutely void. It would be subversive of the entire theory of contracts, and void on the ground of fraud.

Under sections 239 and 241 of the Code of Civil Procedure (R. S. p. 83), the question of adverse possession should have been left to the jury under proper instructions.

The judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

EDWARD ROONEY, appellant, v. GEO. H. TONG ET AL.,  
respondents.

PRACTICE — *What constitutes a judgment roll — What is necessary to perfect an appeal.*— Merely noting an exception, without filing a bill of exceptions, does not become a part of the judgment roll, save as to matters that the law deems excepted to, and presents no question that the court can try.

A statement of the testimony should accompany a bill of exceptions on an appeal from a judgment of non-suit to make it effectual.

*Appeal from Second District, Silver Bow County.*

WORD & BALDWIN, for appellant. No brief.

ROBINSON & STAPLETON, for respondents.

This is an appeal from the judgment roll, on which alone the case can be considered, and the portion of the record asked to be stricken out is no part of the judgment roll. The judgment roll is such papers only as are designated by statute. Sec. 294, subd. 2, Practice Act; *Nev. & Sac. C. Co. v. Kidd*, 43 Cal. 180; *Shattuck v. Hayes*, 21 Cal. 51; Wait's Practice, vol. 3, pp. 584, 715.

There is no bill of exceptions in this case. As to what is a bill of exceptions, see *People v. Toms*, 38 Cal. 141; *Harazthy v. Horton*, 46 Cal. 546; Code Civil Procedure, secs. 281, 816; *Moore v. De Valle*, 28 Cal. 174.

If the bill of exceptions is not signed by the judge, it will be disregarded. *People v. Armstrong*, 44 Cal. 327. There is no bill of exceptions in the record signed by the judge—only an exception taken which is copied from the minutes of the clerk.

WADE, C. J. This is a motion to strike out portions of a transcript on appeal from a judgment of non-suit. There is no statement on appeal, no evidence contained in the record, and no specification of the particular errors upon which the appellant intends to rely. The judgment roll consists of the summons, pleadings, verdict of the

jury, all bills of exception filed in the action, copies of orders sustaining or overruling demurrers and a copy of the judgment. Code, sec. 294.

On appeal from a final judgment, the appellant shall furnish the court with a transcript of the notice of appeal, undertaking on appeal, the pleadings which form the issues tried in the case, the judgment, and such other parts of the judgment roll as are necessary to explain the points relied on, and the statement, if there be one, certified to be correct. Code, sec. 425.

The motion for non-suit was granted and an exception noted, but no bill of exceptions was filed, and, if there had been, it would have presented no question to be tried unless it contained a statement of the testimony. Merely noting an exception, without filing a bill of exceptions, does not become a part of the judgment roll, except as to those matters which by the law are deemed excepted to. Such an exception does not present a question that can be tried by this court. The only intimation of an exception save on the demurrer to the complaint is the one contained in that part of the record which is improperly before us, and which forms no part of the judgment roll.

The motion to strike out is granted.

*Motion granted.*

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EDWARD ROONEY, appellant, v. GEO. H. TONG ET AL.,  
respondents.

- **PRACTICE**—*Bill of exceptions—Statement accompanying.*—The record on appeal from judgment of non-suit should contain a statement of the evidence to accompany a bill of exceptions, or the presumption adheres that the judgment of the court below was sustained by the evidence.

In order to decide whether the court below erred in refusing to allow the filing of an amended complaint, the record should set forth a statement of the grounds on which exception was taken to the ruling of the court below.



*Appeal from Second District, Silver Bow County.*

WORD & BALDWIN, for appellants.

This action was brought to try the title or right of possession of the respective parties in and to a certain piece, parcel or lot of mining ground, claimed by the plaintiffs and appellants as the "Keg" lode mining claim, and by the defendants and respondents as the "Goldsmith" lode mining claim. Before this suit was commenced the respondents had made an application to the government of the United States for a patent to said premises, and the appellants had filed in the United States land office at Helena, Montana territory, their adverse claim to same, and they instituted this action to have the validity of their said adverse claim adjudicated, as they were required to do by the statutes of the United States, or else forfeit all their claim or rights in and to the area in conflict.

The court did not err in sustaining appellants' motion to file an amended complaint. The court below has power to grant amendments whenever, at any stage of the trial, they are necessary for the purposes of justice. *Lestrade v. Barth*, 17 Cal. 285; *Hartley v. Preston*, 2 Mont. 415; *Wormall v. Reins*, 1 id. 630; *Kirstein v. Madden*, 38 Cal. 163; 17 id. 285; 16 id. 357.

A motion to amend a complaint does not come too late because made after the plaintiff has closed his testimony and the defendant has moved for a non-suit. *Farmer v. Cram*, 7 Cal. 135; 32 Cal. 339.

The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, etc. Sec. 117, p. 61, R. S. of Mont. 1879. See, also, secs. 110-114, id.

The court erred in sustaining defendants' motion to strike the amended complaint from the files. It shows that the plaintiffs have a good cause of action against the defendants, and in effect only amends the original

complaint in respect to the allegation of who is in the possession of the premises in dispute; the parties are precisely the same. There is no such change in the subject matter as will alter the purpose and object of the action, *i. e.*, to have the title or right of possession to the same and identical premises determined as between the said parties. The ruling of the court in sustaining the motion last aforesaid, if not reversed, will inflict a great hardship upon the plaintiffs — in fact an irreparable injury — far greater than a compulsory non-suit would ordinarily impose; it would prevent the plaintiffs from ever having their claim to the premises described in the complaint adjudicated upon the merits, however valuable and just their claim might be, for it must, under the circumstances of this case, practically operate as a final determination of this action, for another action could not be brought within the time limited by sec. 2326 of the Revised Statutes of the United States; and a suit not brought within the time thereby prescribed would amount to a waiver of all adverse claims of the plaintiffs to the premises in controversy. See Sickles' Mining Laws and Decisions, pp. 191, 289, 290, and especially pp. 320 and 321.

The actions commonly called ejectment and to quiet title both arise *ex delicto*. There is but one form of civil action under the code. All distinctions between legal and equitable actions have been abolished. Sec. 1, p. 41, R. S. of Mont. 1879. See, also, Pomeroy's Remedies and Remedial Rights, pp. 122-125, 614, 616, §§ 565, 566; and New York and North Carolina cases there cited, which permit even a new and different cause of action to be stated in an amended complaint, if the change does not require an alteration in the summons.

The court erred in sustaining defendants' second motion for non-suit, which ruling was erroneous because the plaintiffs had duly filed, by leave of the court, a good and sufficient amended complaint before such ruling was made. No formal exceptions to the above rulings of the

court below were required to be made at the trial; they are deemed to have been excepted to. Sec. 280, p. 91, R. S. of Mont. 1879.

ROBINSON & STAPLETON, for respondents. No brief.

WADE, C. J. This was an action to quiet title. At the close of the plaintiff's testimony there was a motion for non-suit, which was granted, but as the record does not contain the testimony, we cannot review this action of the court. Thereupon the plaintiff asked leave to file an amended complaint, which was denied, and the plaintiff had an exception noted, but did not file a bill of exceptions, or make any showing why an amended complaint became necessary. The record is entirely silent as to setting forth any reason for the exception. It does not point out any defect in the original complaint to be cured, or any exigency in the proof, making an amended complaint necessary. It does not show that the plaintiff was taken by surprise or that additional averments were necessary to make the complaint correspond with the proof. For all that appears the amendment proposed was not material, or was improper, or one not authorized at that stage of the case.

The decision of the court below is presumed to be correct until the contrary is shown, and the presumption attends the decision when it reaches this court and sustains it until its incorrectness is pointed out. Nor can this court review the decision unless the foundation for so doing is properly laid in the court below.

The judgment is affirmed, with costs.

*Judgment affirmed.*



# INDEX.

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## ACTION.

**What constitutes an action.** The proceedings for the sale of real estate of an intestate are in the nature of an action, of which the presentation of the petition is the commencement, and the order of sale is the judgment. *Broadwater v. Richards*, 80.

## ADMINISTRATION.

1. **Limits of administrator's authority.** An administrator has no authority to sell real estate except by an order of a properly constituted court, properly issued, with which he must strictly comply. *Broadwater v. Richards*, 80.
2. **Who may object.** Any person interested in the estate may file objections to confirmation of sale, and produce evidence on hearing to support the same. *Ib.*
3. **Extent of jurisdiction.** The district court may inquire, on such appeal, into any competent matter affecting the acts or authority of the administrator, including the proper constitution of the court itself, and the qualification of the judge thereof. *Ib.*

## ADVERSE POSSESSION.

1. **What constitutes.** No adverse possession could become operative by going outside of the surface boundaries and sinking a shaft upon what was claimed as another location, but which the jury found to be the same. Adverse possession that could ripen into a title must be open, notorious and under a claim of right. *Pardee v. Murray*, 234.
2. **What is a sufficient allegation of.** Where plaintiff alleges, among other things, lawful, continuous and exclusive possession in herself from August, 1870, to October, 1877, which is denied by defendant, who claims to have held sole, exclusive and peaceable possession of controverted premises since February, 1873, which the replication denies, and the jury find for plaintiff: *Held*, that this sufficiently sets forth a claim of adverse possession under the statute of limitations, which, by the special finding of the jury, had continued long enough to ripen into title. *Sullivan v. Dunphy*, 499.
3. **What may be proved under averment of ownership and right to possession.** Under averment of ownership in fee and right to possession of premises at the time of suit brought, a party can prove any facts which would entitle him to possession at such time. The allegations and denials in this case necessarily involve the question of adverse possession under the statute of limitations. A claim of much longer possession through plaintiff's grantors than this statute requires may be rejected as surplusage. *Ib.*

## ALIENS.

See MINES AND MINERAL LANDS, 596.

## AMENDMENT.

See PLEADING, 421.

## APPEAL.

1. *Motion for new trial necessary to examination of questions of fact.* When there was no motion for a new trial in the court below, the appellate court will not consider the evidence contained in the record on questions of fact. *Largey v. Sedman*, 3 Mont. 472, reaffirmed. *Broadwater v. Richards*, 52; *McCormick v. Hubbell*, 87.
  2. *Appeal from probate to district court — Powers of latter on such appeal.* The district court being the appellate court of the probate court (see sec. 432 of Code of Civil Procedure), and having general jurisdiction, has the inherent power and authority to make any order in a case properly before it that the probate court could itself make. *Broadwater v. Richards*, 52.
  3. *Trial de novo.* Cases appealed from probate to district court, under the Montana statute (see Code, sec. 435), are tried *de novo*, and all irregularities and infirmities in the inferior court become immaterial. *McCormick v. Hubbell*, 87.
  4. *Appeal from probate court of Custer county.* An appeal from the probate court of Custer county to the district court of the same county, taken September 28, 1878, was good, though no district court was established in that county prior to February 8, 1879, being before that time attached to Gallatin county for judicial purposes. *Ib.*
- See PRACTICE, 8; UNDERTAKING, 35; PRACTICE, 8, 513, 596; CONSTITUTIONAL LAW, 8.

## ARRAIGNMENT AND PLEA.

See CRIMINAL LAW, 463.

## ASSAULT.

See CRIMINAL LAW, 295.

## BILL OF EXCEPTIONS.

See PRACTICE, 226, 597.

## BOND.

1. *Bond of county treasurer — How approved.* The approval of the bond of the county treasurer, as provided by art. VI, sec. 87, of the Codified Statutes, must be by the full board, or it must be made to appear affirmatively that its approval otherwise was a case within the exception provided by statute. *Commissioners v. McCormick*, 115.
2. *Not retrospective.* An official bond will not be held to be retrospective unless expressly so stated, and sureties thereon will not be held responsible thereon for default made before signature. *Ib.*

BOUNDARIES.

See MINES AND MINERAL LANDS, 299, 309.

CASES AFFIRMED, OVERRULED OR CRITICISED.

*Belk v. Meagher*, 3 Mont. 80, approved. *Noyes v. Black*, 527.  
*Griswold v. Boley*, 1 Mont. 549, distinguished. *McKinstry v. Clark & Cameron*, 370, affirmed. *Herman v. Jeffries*, 513.  
*Hauswirth v. Butcher*, 4 Mont. 299, affirmed. *Russell v. Chumasero*, 309; *Noyes v. Black*, 527.  
*Hopkins v. Noyes*, 4 Mont. 550, approved. *Noyes v. Black*, 527.  
*Kleinschmidt v. McAndrews*, 4 Mont. 8, considered and applied. *Frost v. O'Neil*, 226.  
*Largey v. Sedman*, 3 Mont. 472, affirmed. *Broadwater v. Richards*, 52.  
*McKinney v. Powers*, 2 Mont. 466, distinguished; *McKinstry v. Clark & Cameron*, 370, affirmed. *Herman v. Jeffries*, 513.  
*McKinstry v. Clark*, 4 Mont. 370, affirmed. *Herman v. Jeffries*, 513; *Noyes v. Black*, 527.  
*Missoula County v. Edwards*, 3 Mont. 60, affirmed. *Commissioners v. McCormick*, 115.  
*Reece v. Roush*, 2 Mont. 590, affirmed. *Lamme v. Dodson*, 560.  
*Story v. Maclay*, 3 Mont. 480, affirmed. *Story v. Maclay*, 464.  
*Taylor v. Holter*, 1 Mont. 712, approved. *McAdow v. Black*, 475.  
*Territory v. Edmonson*, 4 Mont. 141, affirmed. *Territory v. Tunnell*, 148.  
*Tibbitts v. Ah Tong*, 4 Mont. 536, approved. *Noyes v. Black*, 527.

CONSTITUTIONAL LAW.

1. *Appeals and bills of exceptions.* The provisions of the Montana code regulating appeals and bills of exceptions are not in violation of organic act, section 9, but in accordance with powers therein delegated to the legislative assembly of Montana. *Kleinschmidt v. McAndrews*, 8.
2. *Effect of submission of city charter to vote of the people.* All the legislative powers of the territory are by the organic act vested in the territorial legislature. They cannot be delegated away or lawfully exercised by anybody else. Among these powers is that of creating municipal governments by charter, as auxiliaries in matter of local government. Such charters derive all their powers from legislative enactment, and none from the consent of those who are to live under them; but the legislature may make the consent of one, a few or many of those on whom the charter is to operate, the contingency upon which the charter shall take effect. *People ex rel. Boardman v. City of Butte*, 174.
3. *Submission to a limited class valid.* A submission to the resident tax-paying householders is competent, legal and proper — no one's constitutional rights are abridged thereby, and none have right to complain. Such limitation of the right to vote does not render void the act of incorporation. *Ib.*

See JURY, 149, 433; COUNTY COMMISSIONERS, 280.

CONTRACTS.

1. *Time of payment of money owing not fixed.* If no time is fixed for payment of money acknowledged to be owing, it is due at once, or at any time the payee may choose to demand it. *Sweetland v. Barrett*, 217.



## CONTRACTS — continued.

2. *Agreement without consideration.* An agreement by one of three parties to the other two, all three of whom were equally obligated to a fourth party, to procure the payment of their common indebtedness from other resources of an insolvent company, for which they were personal security, is without any valid consideration and void. *Kinna and Ming v. Woolfolk*, 318.
3. *Nudum pactum.* Representations of a joint debtor, made to induce his co-debtors to borrow money with which to settle another pre-existing greater obligation, will not render him directly liable therefor. It will be presumed that the principal consideration in such case was the release from their own valid, pre-existing indebtedness. *Ib.*
4. *Contracts must be mutual.* Every contract must be mutual as to remedy and obligation, and will not be enforced against one who has not the power to enforce it in his own behalf. *Ryan v. Dunphy*, 342.
5. *If express contract be pleaded, action is not sustainable as on an implied contract.* Where an express verbal contract is pleaded, the action cannot be sustained as on an implied contract for money laid out and expended at the instance and request of respondent. *Ib.*

## CONVEYANCES.

See POWER OF ATTORNEY, 475.

## CORPORATIONS.

See FOREIGN CORPORATIONS, 1.

## COUNTERCLAIM.

See STATUTE OF FRAUDS, 342.

## COUNTY COMMISSIONERS.

1. *Checks not money.* A board of county commissioners has no right or authority, in their settlement with treasurer, as provided by statute, to accept and count as money the checks of third parties. *Commissioners v. McCormick*, 115.
2. *Cannot exercise judicial powers — Certifying probable cause.* The act of February 13, 1874, which confers on county commissioners the power to disallow any bill of costs in cases whose prosecution they might judge was not required by the public welfare, must be construed in connection with sec. 410 of the Criminal Practice Act, which provides that in cases less than felony, where defendant is discharged, the costs shall be taxed to the prosecution, or person on whose oath the action shall have been instituted, unless the officer trying the case shall certify that there was probable cause, in which event they shall be paid by the county where the offense was committed. This certificate of probable cause is a judicial act, and can only be reviewed by judicial authority. County commissioners have no such judicial powers, nor by the organic act can the legislature confer such powers upon them. *Hedges v. Commissioners*, 280.
3. *Exercise of discretionary powers.* In all cases where commissioners are rightfully clothed with discretionary powers in allowance

## COUNTY COMMISSIONERS — continued.

of claims against the county, such discretion must be controlled by legal considerations and cannot be exercised arbitrarily. And whenever such power is exercised it is always subject to review by the courts, for which an appeal is provided by law in all cases. *Davis v. Commissioners*, 292.

## COUNTY TREASURER.

See BOND, 115; COUNTY COMMISSIONERS, 115.

## CRIMINAL LAW.

1. *Misdirection of jury.* Where the judge, in his charge and instruction to the jury, stated that the defendant admitted the shooting and killing of deceased as charged in the indictment, while the record showed the admission to have been that "the shot he fired killed Jones at the time and place alleged in the indictment," it was such a variance as to mislead a jury, to the prejudice of the accused, and is ground to set aside the verdict. *Territory v. Tunnell*, 148.
2. *Assault with intent to commit murder, and assault and battery.* Under an indictment charging the statutory offense of assault with intent to commit murder, a defendant cannot be convicted of a simple assault and battery. If the indictment were properly drawn, under the statute, it would support a conviction for a simple assault. Battery is not an essential part of the assault with intent to commit murder. If a charge of assault and battery is contained in the indictment therewith, two separate offenses would be charged. *Territory v. Dooley*, 295.
3. *Indictment bad for main offense not good for a minor offense.* An indictment, bad for the main offense charged, will not be good to support a charge or conviction for a lesser offense that might be necessarily included. *Ib.*
4. *Objection first raised in appellate court.* Objections made for first time in appellate court, that the record does not show arraignment and plea, will not be considered, but those facts presumed. *Territory v. Shipley*, 468.
5. *Insufficiency of description of property.* An indictment for larceny of bank bills, describing them as "Sundry bank bills issued by authority of the United States of America," and giving only the aggregate amount and value, is bad on demurrer for insufficiency of description. The number and denomination of each bill should be given, or the failure to do so accounted for. *Ib.*

See JURY, 149; EVIDENCE, 148.

## DAMAGES.

See PLEADING, 433.

## EJECTMENT.

See ADVERSE POSSESSION, 499.

## EQUITY.

See SPECIFIC PERFORMANCE, 100.

## EVIDENCE.

1. *What is admissible on trial de novo.* A case appealed from probate to district court, being tried *de novo*, the objectors may present any evidence pertinent to the objections, though not raised on trial in the court below. *Broadwater v. Richards*, 80.
2. *Homicide—Preponderance of evidence to prove mitigating circumstances.* In cases of homicide, the true and better rule, according to both principle and statute, is that matters of justification, excuse or mitigation should be proven, as any ordinary fact, by a preponderance of testimony; and it is error to charge a jury that such facts should be proven beyond any reasonable doubt. *Territory v. Edmonson*, 141; *Territory v. Tunnell*, 148.
3. *Testimony must conform to the pleadings.* Defendant having denied possession of plaintiff's ground, the court held rightly that no testimony offered by defendant of forcible possession was admissible. Testimony must conform to the allegations of the pleadings. *Pardee v. Murray*, 234.
4. *Books of account.* To admit a book of account as evidence, preliminary proof must show that it was a book of original entries in which ordinary business transactions and a course of dealing with various persons appear, entered at the time of the transaction; also that the person making the entries kept true and honest accounts; and the book itself should first be submitted to the inspection of the court. *Ryan v. Dunphy*, 356.
5. *Memorandum book.* A memorandum book with the entry of a single sale or transaction, though such entry were made at the time of the transaction, is not such an account book as the law contemplates; it should go no further than to serve to refresh the witness' memory. *Ib.*
6. Though the rule of the law regarding the interest of witnesses has changed, the reason of the rule as to the admission of book evidence remains the same. *Ib.*
7. *Certified copies.* A certified copy of the record of a declaratory statement or deed is made competent evidence, by the statutes of Montana, without producing or accounting for the loss of the original instruments. *McKinstry v. Clark & Cameron*, 370.
8. *Burden of proof.* In a case where defendants claim by virtue of two locations made from a single discovery hole, where only one could be valid, it was error in the court to charge that a plaintiff in an action of ejectment claiming the premises by virtue of a relocation, should bear the burden of proving which one of the two locations was invalid. *Ib.*
9. *Expert.* Before a witness is allowed to draw and exhibit to a jury a map of a county to illustrate his testimony as to the reasonable and probable cost of transporting merchandise through the same, it should appear that he had some knowledge of the country and some means of knowing the cost of such transportation. *Story v. Maclay*, 464.

See MINES AND MINERAL LANDS, 412, 550; PRACTICE, 8, 370.

## EXCEPTIONS.

See PRACTICE, 8, 379, 513.

## FOREIGN CORPORATIONS.

1. *Effects of failure to record charter—May do business.* The law requiring foreign corporations doing business in this territory to



**FOREIGN CORPORATIONS** — continued.

first file charter or act of incorporation, declares the failure to do so to be wilful negligence, and fixes the penalty therefor to be, not disqualification to do business in the territory, but simply relieves the party suing such corporation from the necessity of proving the incorporation, except by reputation. *King v. National M. & E. Co.*, 1.

2. *May plead statute of limitations.* A foreign corporation doing business openly, without fraudulent concealment, with an office and a managing agent or superintendent within the territory, though it has not filed its charter, articles of incorporation, or copy thereof, for record as required, is not a foreign resident within the meaning of section 50, Code of Civil Procedure, and a personal judgment could be rendered against it, and it could plead the statute of limitations. *Ib.*

**HABEAS CORPUS.**

*Power of agents over Indian children.* A writ of *habeas corpus* will not lie in favor of an Indian agent to recover the custody of Indian children taken from an agency school by a Catholic priest, it not appearing to have been done against the consent of the parents of such children. Neither by treaty or statute have the Indians surrendered to the United States the right to compel their children to attend school, nor has the United States assumed to possess or exercise such right. If the Indians fail in their treaty engagements in this respect, neither treaty or statute provide a penalty, nor does the right of compulsion pass to the United States or its agents. It must be exercised by the parents of such children or the tribe to which they belong. *United States ex rel. Young v. Imoda*, 38.

**HOMICIDE.**

See EVIDENCE, 148.

**INDIANS.**

See HABEAS CORPUS, 38.

**INDICTMENTS.**

See CRIMINAL LAW, 295, 468.

**INSTRUCTIONS.**

*Withholding instructions from jury, though by mistake, ground for new trial.* It is cause for granting a new trial if important instructions given by the court were not sent in to the jury, with others, though the omission was unintentional. Either the jury should have had all or none of the instructions given. *Hammond v. Foster*, 421.

See CRIMINAL LAW, 148.

**JUDGMENT.**

See PRACTICE, 87, 400.

## JUDICIAL NOTICE.

See MINES AND MINERAL LANDS, 412.

## JURISDICTION.

See ADMINISTRATOR, 80.

## JURY.

1. *Right to a full and lawful panel at the commencement of trial.* Every litigant has the right to have a full and lawful panel before him at the commencement of a trial from which first to select a jury. If, between the time of selecting the panel and the commencement of the trial, the law should be changed so as to require a larger panel, the litigant has the right to demand the larger panel. *Kenyon v. Gilmer*, 433.
  2. *Indispensable number in trial of felonies — No waiver by consent.* In the trial of all felonies, more especially of capital offenses, a jury of twelve men, neither more or less, is an indispensable requirement of the law. It is not a privilege that can be waived either by prosecutor or defendant, or allowed by the court. *Territory v. Ah Wah and Ah Yen*, 149.
  3. ———. *Trial a nullity.* A trial of such a cause before a jury of eleven men, though with consent of defendants, is a nullity, and any judgment thereon without jurisdiction and void. *Ib.*
- See PRACTICE, 87.

## LARCENY.

See CRIMINAL LAW, 468.

## MARRIED WOMEN.

See SOLE TRADERS' ACT, 364, 513; SURETY, 87.

## MINES AND MINERAL LANDS.

1. *Quartz lode location — Grant — Right of possession.* A location on the public mineral lands of the United States, made in strict accordance with the law of congress, carries with it a grant and a right to exclusive possession. *Hauswith v. Butcher*, 299.
2. *How grant made effectual.* To make this grant effectual, the location must be distinctly marked on the ground, and the record of the location must contain such a description as will identify the claim by reference to some natural object or permanent monument. Neither grant or right of possession attach to a location that does not give the notice required. *Ib.*
3. *Substantial compliance.* There must be substantial compliance with law as to the length of a claim. A claim of a mining location two thousand feet in length will not protect claimants against intervening claims of third persons for the five hundred feet more than the law allows. *Quære*, whether such a claim would be good for fifteen hundred feet or entirely void for uncertainty. *Ib.*
4. *Boundaries and record to correspond.* It is essential that the proper length be marked on the ground as stated in the record, and the two should correspond. *Ib.*

## MINES AND MINERAL LANDS — continued.

5. *Quartz lode claims* — *Sufficiency of declaratory statement matter of proof.* What are or what are not permanent objects or monuments, as contemplated by the act of congress allowing entries of mineral claims on the public domain, is properly matter of proof for a jury, and cannot be decided by the court by simple reference to the declaratory statement. *Russell v. Chumaseo*, 309.
6. *Defective record cured.* A defective record might be cured by stakes or monuments on the ground to identify the claim. *Ib.*
7. *Boundaries.* A description giving other claims for boundaries may be good if those claims are marked on the ground as the law contemplates, and this should be open to proof. *Ib.*
8. *Placer mining grounds* — *How held* — *When open.* The United States law of July 26, 1866, gives to all citizens, and those who have declared their intention to become such, the right to explore and occupy the mineral lands of the United States, subject to the rules and regulations prescribed by law, and the local rules and customs of miners not in conflict with such law. Such local rules and customs become, by adoption, part of the law of the land. And a person who is competent, having taken up and held such mining ground, and this fact appearing by the pleadings and findings, has acquired inchoate title, and the right to exclusive possession. A grant is presumed. Such ground so held cannot be considered unoccupied public domain subject to the appropriation of any one else. *Gropper v. King*, 367.
9. *Possession.* Right of possession comes only from a valid location. *McKinstry v. Clark & Cameron*, 370.
10. *Evidence* — *Declaratory statement must be on oath.* According to the act of the Montana legislature of May 8, 1873, the declaratory statement of location of a quartz mining claim, required to be recorded, must be on oath. Objection to the introduction of such a declaratory statement in evidence when the same is not sworn to as required was properly sustained by the court. *Russell v. Hoyt*, 412.
11. *Judicial notice.* Courts will not take judicial notice of the situation of a private claim on land or mining ground, or its distance from the seat of government. It is the duty of those claiming the benefit of any exception to the general application of any statute to make such fact appear by proof. *Ib.*
12. *Bare possession.* Mining ground cannot be held by possession alone against a valid location. Such location is a condition precedent to a grant from government. Possession follows and derives its right from a valid location. *Noyes v. Black*, 527.
13. *Right of possession.* Possession is sufficient to maintain trespass or ejection against a stranger, but not against one who has the right of possession. *Ib.*
14. *Disabilities of an alien as to mineral lands.* The exploration and purchase of the mineral lands of the United States are by law (see R. S. U. S. sec. 2319, p. 427) free only to citizens of the United States, or those who have declared their intention to become such. An alien can neither locate, possess, purchase or acquire title by patent to such mineral lands. *Tibbitts v. Ah Tong*, 536.
15. *Effect of such land passing into the possession of an alien.* A possessory title of mineral land, founded on a valid location, and held by compliance with local mining laws, may be transferred from one to another, so long as it does not pass into the hands of one incapable of acquiring complete title, in which latter case the grant reverts to government, and the land becomes subject to relocation. *Ib.*



## MINES AND MINERAL LANDS — continued.

16. *Possession and right of purchase inseparable.* The right of possession cannot be held by one incapable of holding by purchase from government, else the government might be deprived of its power to sell forever. Possession and the right and power to purchase are inseparable. *Ib.*
17. *Mere possession of mining claim insufficient.* Mere possession of a mining claim, without location, or under a location dead by reason of non-compliance with local rules and regulations, presumes no grant and carries no right of possession against one claiming under a valid location. *Hopkins v. Noyes*, 550.
18. *Proof necessary.* Proof of possession only, on a trial of an issue as to forfeiture for non-compliance with the rules and regulations of a mining district, is immaterial, and may be ruled out without error. *Ib.*
19. *Real estate.* The locator of a mining claim takes as by grant from government, and such possessory title is real estate, expressly declared to be such by Montana statute, and is within the statute of frauds, and can only be transferred by deed. *Ib.*

See ADVERSE POSSESSION, 234.

## MORTGAGE.

1. *Effect of notice.* Whatever will validate a mortgage between the parties will validate it as to third parties with notice. Actual notice is as effectual as the constructive notice of record. *McAdow v. Black*, 475.
2. *Rights of execution creditor who takes property with notice.* An execution creditor with notice takes the property subject to any lien or equity that might be enforced against the judgment debtor. *Ib.*

## MUNICIPALITIES.

See CONSTITUTIONAL LAW, 174.

## NEGLIGENCE.

See PLEADING, 433.

## NEW TRIAL.

See INSTRUCTIONS, 421; PRACTICE, 80, 87.

## NON-SUIT.

See PRACTICE, 8, 226, 457.

## NOTICE.

See MORTGAGE, 475; POWER OF ATTORNEY, 475.

## PARTIES.

See PLEADING, 46.

## PARTNERSHIP.

SEE PLEADING, 46; SPECIFIC PERFORMANCE, 100; STATUTE OF FRAUDS, 100.

## PLEADING.

1. *Misjoinder of parties*—*Agency or partnership*. A complaint that sufficiently charges a partnership and asks for an accounting is not demurrable for ambiguity, though it sets forth in addition special cause of action against one of the partners. The latter may be stricken out on motion as surplusage, or *quare*, may be good as re-enforcing the allegation of partnership. The action cannot proceed against one partner alone as agent until after an accounting, to which all partners are necessary parties, and there is no misjoinder in including all partners as defendants. *McMahon v. Thornton*, 46.
2. *Ambiguity and multifariousness*. Such complaint is not obnoxious to the charge of multifariousness unless it sets forth two distinct causes of action such as could not be united under the code. *Ib.*
3. *Immaterial variance*. An appellate court will not sustain an objection to findings of a court below on the ground of variance between the proof and the pleadings, raised therein for the first time, and when it does not appear that the complaining party has actually been misled thereby. *Southmayd v. Southmayd*, 100.
4. *Testimony introduced without objection presumed to be justified by the pleadings*. When the record shows that testimony of possession was introduced on trial without objection, it will be presumed that the pleadings justify such testimony. *Ib.*
5. *Statute of frauds*. The statute of frauds has not changed the rule of pleadings. A parol promise, valid under the common law, may be declared on now as formerly; the writing is matter of proof and not of allegation. *Sweetland v. Barrett*, 217.
6. *Testimony must conform to the pleadings*. Defendant having denied possession of plaintiff's ground, the court held rightly that no testimony offered by defendant of forcible possession was admissible. Testimony must conform to the allegations of the pleadings. *Pardee v. Murray*, 234.
7. *Consistency of pleadings*. Pleadings ought to support the judgment and must be consistent. *Hauswirth v. Butcher*, 299.
8. *Presumption*. The rulings of a court will be presumed to be based upon the state of the pleadings. *Ryan v. Dunphy*, 342.
9. *Time of making objection to want of a replication*. The objection that there was no replication to the answer among the pleadings cannot be made for the first time in the appellate court. *Russell v. Hoyt*, 412.
10. *Amendment of pleadings*. It is in the discretion of the court to refuse to allow amendments to pleadings, if in its judgment they are not needed or warranted by the facts of the case. *Hammond v. Foster*, 421.
11. *Negligence must be negatived*. In an action for damages for injuries received, when the complaint shows that the proximate cause of the injury was plaintiff's own act, it further devolves upon him to allege and prove that in thus acting he exercised that degree of care and prudence that a reasonable person would have used in like circumstances. *Kennon v. Gilmer*, 433.
12. *Construction*. The allegations of pleadings must be construed with a view to substantial justice between the parties. *Sullivan v. Dunphy*, 499.

## PLEADING — continued.

13. *Equitable title must be pleaded.* A party who desires to avail himself of an equitable title must plead it specially or will be excluded from giving evidence thereon. *Lamme v. Dodson*, 560.

See ADVERSE POSSESSION, 499. CONTRACTS, 342. SOLE TRADERS' ACT, 364.

## POWER OF ATTORNEY.

1. *Conveyances by, when they will bind parties.* Conveyances, by power of attorney, though not under seal, nor acknowledged or recorded, if executed according to instructions and ratified, will bind parties thereto and third parties with notice. *McAdow v. Black*, 475.
2. *Error in rejecting evidence.* It was error in court below to reject testimony of plaintiff of a mortgage executed by power of attorney, because the same was not under seal, and acknowledged and recorded as required by section 203, Revised Statutes, coupled with offer to prove that the mortgage was executed according to instructions and ratified, and that defendants had full knowledge of these facts before purchase. *Ib.*
3. *Sections 203 and 1163, 5th Div. Gen. Laws (Rev. Stat. 1879), construed — Powers of attorney to be judged by same rule as deeds.* Section 203 must be construed in connection with section 1163 of Revised Statutes. Powers of attorney must be construed by same rule as applies to deeds. No seal necessary to either. As between parties thereto, and third parties with notice, a deed is good without acknowledgment or record. *Taylor v. Holter*, 1 Mont. 712. *Ib.*
4. *Equitable rights ascertained without compliance with statute.* Compliance with requirements of statute is necessary to give legal validity to the signature of an attorney in fact, but the equitable rights may be ascertained without such compliance. *Ib.*

## PRACTICE.

1. *Statement on appeal.* An appeal from a decision of a district court sustaining a motion for non-suit and directing entry of judgment for defendant, should be by a statement on appeal, containing the evidence settled by the court in the presence of the parties. A statement on motion for new trial would be improper, for in such case there has been no trial proper. *Kleinschmidt v. McAndrews*, 8.
2. *When objection made.* Objection to the decision of the court, in such case, cannot, in the nature of things, be made till after such decision is rendered, and cannot be such an exception as defined by statute, and intended to be included in a bill of exceptions. *Ib.*
3. *Appeal without statement.* By an appeal from judgment without statement nothing is brought up, or is part of the record on appeal, but the judgment roll; nothing else will be considered. *Ib.*
4. *How exceptions must be saved.* No exceptions will be considered save such as are taken in the mode prescribed by statute. *Ib.*
5. *Motion for non-suit.* A motion for non-suit under our statute is, like a demurrer to evidence under the old English procedure, purely a question of law for the courts. *Ib.*
6. *Where there is no motion for new trial supreme court will not look into the evidence.* Where, upon an appeal from an order of the



**PRACTICE** — continued.

- probate court affirming the sale of real estate, such order was set aside after hearing by the district court, and there was no motion for a new trial, the supreme court will not examine the evidence, though contained in the record, but will presume that the evidence sustained the findings and judgment of the district court. *Broadwater v. Richards*, 80; *McCormick v. Hubbell*, 87.
7. *Misconduct of jury—Irregularity in entry of judgment.* Remedy for misconduct of jury and irregularity in entering judgment should be by motion for new trial. They cannot be reached in a collateral attack upon such judgment. *McCormick v. Hubbell*, 87.
8. *Remedy on appeal.* The proper remedy on appeal from a final decision of non-suit is by a statement on appeal in accordance with sec. 419 of Code of Civil Procedure. *Frost v. O'Neil*, 226.
9. *Bill of exceptions, how taken.* A bill of exceptions, to become part of a judgment roll, and entitle it to the consideration of an appellate court, should be taken during the trial and before the final decision. *Ib.*
10. *Evidence, how made a part of judgment roll.* Evidence can only be made a part of the judgment roll by being settled in a bill of exceptions. *Kleinschmidt v. McAndrews*, 8.
11. ———. *When brought up by bill of exceptions.* On appeal from decision refusing non-suit, the evidence can be brought up either by bill of exceptions or statement on appeal, because in such case the rule is during trial and before final decision. *Ib.*
12. *Abstract.* Only so much of the evidence need be stated in the abstract as is necessary to explain an objection. *McKinstry v. Clark & Cameron*, 370.
13. *Exceptions.* Exception taken in writing at the proper time to each of the instructions given at the instance of one of the parties to an action, so far as the same were separately numbered and marked by the judge, was sufficient compliance with the law, and not within the objection declared in *Griswold v. Boley*, 1 Mont. 549, and *McKinney v. Powers*, 2 Mont. 466. *Ib.*
14. *How to subject defendants not served to a judgment obtained in probate courts.* When a judgment has been obtained in the probate court of one county against parties jointly indebted, but service is had only upon part, others residing in another county, such judgment can only be executed against the partnership property of the joint debtors and the individual property of those served. *Kleinschmidt v. Freeman & Barkley*, 400.
15. ———. To make such judgment binding against the debtors not served, the transcript of the judgment in the probate court should be filed with the clerk of the proper district court, and then by *scire facias* the other defendants not served should be brought in to show cause why they should not be made parties to the judgment. *Ib.*
16. ———. A suit *de novo* in the district court cannot be maintained; but plaintiffs, having elected to proceed by action in the probate court, must put in operation the appliances of law in aid of such judgment, or show cause why it has not been done, before resorting to other remedy or course of procedure. *Ib.*
17. *Striking out evidence.* It is error in the court to strike out or withdraw from the consideration of a jury evidence that is competent under the pleadings. *Hammond v. Foster*, 421.
18. *Evidence necessary to consider questions of granting non-suit and admitting improper testimony.* Error in sustaining motion for non-suit cannot be considered in appellate court without the evidence

## PRACTICE — continued.

- upon which the judgment of the court below was based. *Lockey v. Horsky*, 457.
19. ———. To determine whether the court below erred in admitting improper testimony, there should have been a motion for new trial, and a statement as provided by law. *Ib.*
  20. *Exceptions.* Exceptions of a general nature which do not particularly state the point of exception will be disregarded on appeal. *Herman v. Jeffries*, 518.
  21. *Agreements of counsel will not supply the statute requisites.* An agreement of counsel that certain matters shall be deemed excepted to, without complying with the requirements of statute as to saving exceptions, will be disregarded. Such exceptions should be written down and filed with the clerk before the cause is submitted to the jury. *Ib.*
  22. *What constitutes a judgment roll.* Merely noting an exception, without filing a bill of exceptions, does not make it a part of the judgment roll, save as to matters that the law deems excepted to, and presents no question that the court can try. *Rooney v. Tong*, 596.
  23. *What is necessary to perfect an appeal.* A statement of the testimony should accompany a bill of exceptions on an appeal from a judgment of non-suit to make it effectual. *Ib.*
  24. *Bill of exceptions.* The record on appeal from judgment of non-suit should contain a statement of the evidence to accompany a bill of exceptions, or the presumption adheres that the judgment of the court below was sustained by the evidence. *Rooney v. Tong*, 597.
  25. *Statement accompanying.* In order to decide whether the court below erred in refusing to allow the filing of an amended complaint, the record should set forth a statement of the grounds on which exception was taken to the ruling of the court below. *Ib.*

See INSTRUCTIONS, 421; APPEAL, 87.

## PROBATE COURT.

See PRACTICE, 400.

## \* PROBATE JUDGES.

*Fees of probate judges.* The act of May 3, 1873, provided for fees of probate judges in matters of probate jurisdiction, and further provided that "for all civil cases, and other than probate matters, the same fees as are allowed to clerks of the district court in similar cases." *Held*, that the fees provided by act of January 12, 1872, for clerks of the district court, became part of the fees of probate judges for all cases "other than probate matters," and such fees were not abolished by the act of February 21, 1879, substituting a salary for fees as compensation of clerks of district court. Fees in criminal cases, though not specifically mentioned, are necessarily included in that provision for cases *other than probate matters*, and were such as by the act of January 12, 1872, were provided for clerks of the district court. No other construction gives consistent force to all the language of the statute. *Hedges v. County Commissioners*, 250.

REAL ESTATE.

1. *Conveyance to wife—Husband must join with wife to recover.* A conveyance of real estate to wife, with no words of limitation, vests title in her, and the husband is only entitled to rents and profits. The husband should be joined with wife in action to recover such estate. *Hopkins v. Noyes*, 550.
2. *Co-tenant can maintain action.* Where parties hold an undivided third interest in real estate by good title, though that to the other two-thirds may be defective, they can maintain action for the exclusive possession of the entire property against all the world, except their co-tenants. *Ib.*
3. *Parol agreement to sell—What possession is a part performance—Adverse possession.* The proof showed legal title in L. since October, 1871; that W. was occupant of premises before L. acquired title, and afterwards acknowledged L.'s title, and made parol agreement for purchase of premises to be paid for in specified work; that L. made demand for this work, but it never was performed by W., who was still in possession of the premises at the time of his death, in February, 1881. In action by L. against W.'s executor and the executor's tenant for possession on ground of legal title, to which defendants pleaded adverse possession under statute of limitations, and plaintiff replied possession under parol agreement to purchase on conditions never performed: *Held*, that it was error to charge jury to find for defendants by reason of adverse possession; the question of adverse possession should have been submitted to the jury; that a parol agreement for sale of real estate is void unless there is part performance, and that possession of premises under a previous holding is not such part performance; that plaintiff was under no obligation to file as a claim against the estate the estimated value of the work that decedent was to perform in payment of the premises. *Lamme v. Dodson*, 560.

See ACTION, 80; ADMINISTRATOR, 80; MINES AND MINERAL LANDS, 550; STATUTE OF FRAUDS, 342.

SOLE TRADERS' ACT.

1. *Remedial legislation.* This act of February 4, 1874, of the Montana legislature (see Revised Statutes of 1879, p. 589), is of the nature of remedial legislation, and entitled to a liberal construction. It is as essential that the declaration required by law should state that the married woman intends to do business "on her own account," as "in her own name." The two requirements are not synonymous, but each a distinct essential. *Manton v. Tyler*, 364.
2. *Essentials.* The statute is in the nature of a legislative grant. It confers title when complied with. The omission of these essential words, "on her own account," is fatal to the declaration. *Ib.*
3. *Married woman's separate property list.* A married woman may protect her separate property from attachment for her husband's debts by filing a list thereof as required by law in the county where she resides at the time of such filing, and the same will hold good till she acquires a residence in another county. *Herman v. Jeffries*, 513.
4. ———. While *en route* from one county to another, such married woman may file this list in any county through which she passes, and such filing would be a protection from seizure in such county. The purpose of the filing is notice, and it is no ground of com-



**SOLE TRADERS' ACT — continued.**

plaint if such notice is given in all the counties through which a person might pass in moving from one to another. Length or permanency of residence are not necessary to give a right to file such a list. Good faith and rightful ownership are the main essentials. *Ib.*

**SPECIFIC PERFORMANCE.**

1. *When specific performance may be enforced.* When the findings show the existence of a mining partnership between appellant and respondent, under a verbal agreement that the latter shall control all the interest of the former, receive all the proceeds thereof until the purchase price was paid, followed by both actual and constructive possession under the verbal agreement, though no money was paid down by the appellant when he entered into possession and partnership, it is such a part performance of a verbal contract as to take it out of the statute of frauds, and specific performance will be enforced. *Southmayd v. Southmayd*, 100.
2. ———. The facts found warrant an order for an accounting, and if the profits received amount to the price agreed to be paid, further specific performance may be enforced. *Ib.*

**STATUTE OF FRAUDS.**

1. *Mining partnership — Possession — Part performance.* When the findings of the court below show the existence of a mining partnership between appellant and respondent, under a verbal agreement that the latter shall control the interest of the former, receive all the proceeds thereof until the purchase price was fully paid, followed by both actual and constructive possession under the verbal agreement, though no money was paid down by appellant when he entered into possession and partnership, it is such a part performance of a verbal contract as to take it out of the statute of frauds, and specific performance will be enforced. *Southmayd v. Southmayd*, 100.
2. *How pleaded.* The statute of frauds has not changed the rule of pleadings. A parol promise, valid under the common law, may be declared on now as formerly; the writing is matter of proof and not of allegation. *Sweetland v. Barrett*, 217.
3. *Presumption.* There is no presumption of law that a contract required to be in writing is parol. *Ib.*
4. *Verbal contract for sale of real estate is void.* An express verbal contract for the sale of real estate is void under the statute of frauds in force in Montana. *Ryan v. Dunphy*, 342.
- *Testimony inadmissible.* Whenever, in the progress of a trial, this fact appears, objection to all testimony as to the nature and substance of such contract will be sustained by the court. *Ib.*
6. *Not enforceable in equity, and cannot be the basis for a counterclaim.* Such contract could not be the basis of an action in equity to enforce a specific performance, and no more can it be the basis for a counterclaim or cross-action. *Ib.*

**STATUTE OF LIMITATIONS.**

1. *Possession of lode claim.* Possession of the surface of a lode claim is possession of all veins, lodes and ledges whose tops or apexes are within such surface lines, and possession of such sur-

## STATUTE OF LIMITATIONS—continued.

face protects all such veins, lodes and ledges from operation of the statute of limitation. *Pardee v. Murray*, 234.

1. *When statute would begin to run.* The statute of limitations would only begin to run from the time that it became known to the prior locator that the new location was being worked upon the same vein or lode. *Ib.*
2. *Real estate—Adverse possession—Right of recovery barred by statute of limitations.* Where the findings of fact show that the defendant had been in actual possession, under claim of ownership of certain ground in controversy, having the same inclosed with a substantial fence, for more than eight years after plaintiff's right of action, if any, accrued, the latter's right of recovery is barred by the statute of limitations. *Lockey v. Horsky*, 457.

See FOREIGN CORPORATION, 1; EJECTMENT, 490.

## STATUTORY CONSTRUCTION.

See FOREIGN CORPORATION, 1; CONSTITUTIONAL LAW, 8; SOLE TRADERS' ACT, 364; COUNTY COMMISSIONERS, 280; POWER OF ATTORNEY, 475; PROBATE JUDGES, 280.

## SURETY.

1. *Defense of sureties.* Sureties on an appeal bond or undertaking cannot go behind the judgment to set up any matter of defense of their liability which might have been pleaded or shown in the original action, such as that the inferior court was improperly constituted or the judgment improperly rendered therein. *McCormick v. Hubbell*, 87.
2. *Verbal representations.* The liability of sureties is not affected by any verbal representations as to the contents or effect of an instrument when they have had full opportunity to see and judge for themselves. *Ib.*
3. *Defense of coverture.* The defense of coverture in the defendant in the principal action cannot be raised by sureties in an action brought on the undertaking on appeal. *Ib.*
4. *Suretyship—How proved.* The fact of suretyship may be proved by parol. Such proof does not change the contract, or the liability of the party making it. *Smith v. Freyler*, 489.
5. *Remedy of surety.* It will not release a surety on a promissory note from his liability thereon, though the creditor fail or refuse to sue the principal debtor, after notice by the surety, even though at the time of such notice the principal debtor was good and afterwards became insolvent. The surety's remedy is to pay the note and himself sue the principal debtor. *Ib.*

## TRESPASS.

*Cross-veins.* In case of a cross-vein the prior locator is entitled to all the ore or mineral within the space of intersection, but the subsequent locator has the right of way through the space of intersection. If the latter should take the ore from the space of intersection, he would be liable therefor in an action of trespass. *Pardee v. Murray*, 234.

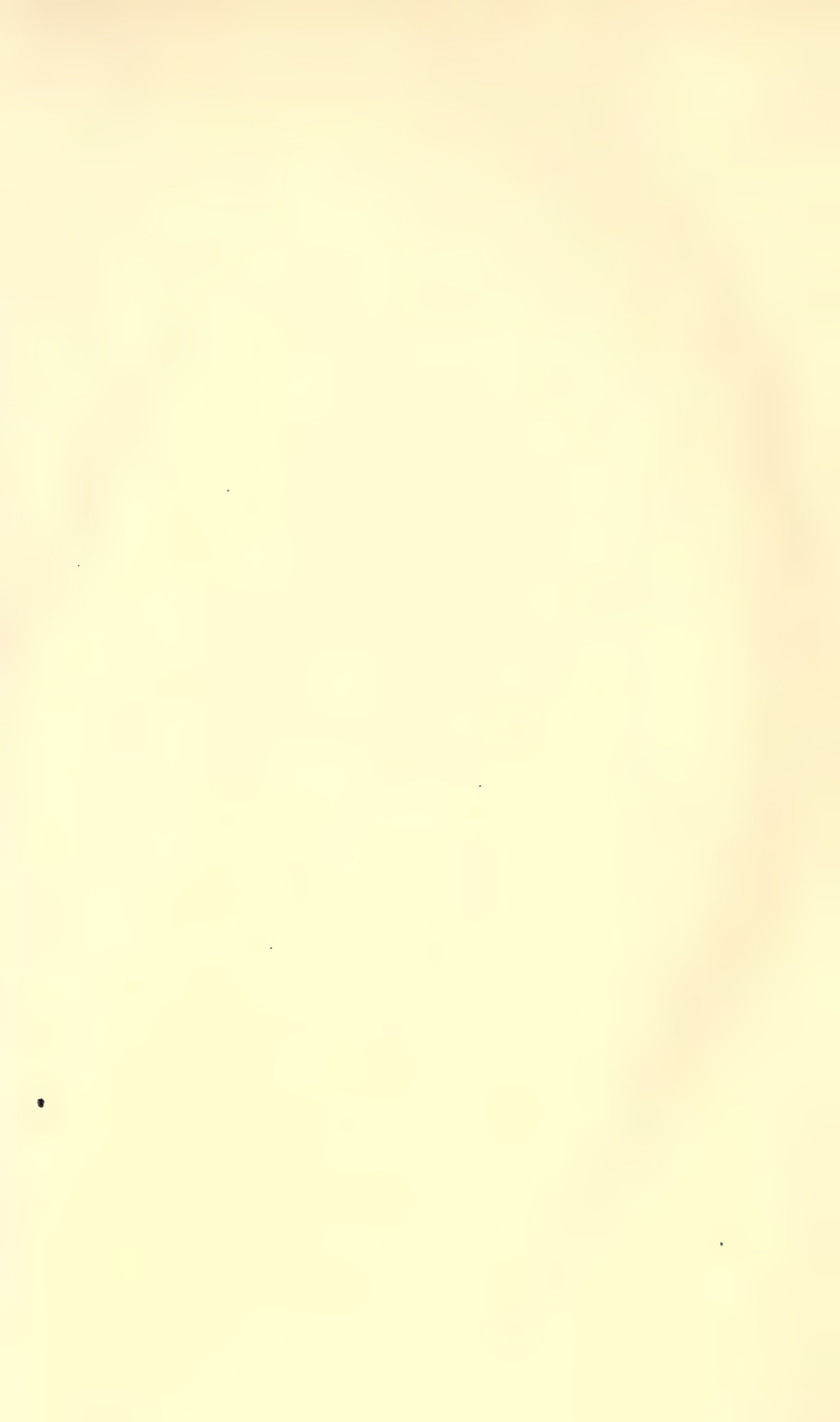
## UNDERTAKING.

1. *Time of filing undertaking.* An appeal to the supreme court is ineffectual unless an undertaking is filed within the time limited by statute. *Pardee v. Murray*, 35.
2. ———. *How error in record corrected.* If the undertaking was filed within the statutory time, and the error is in the record, the correction must be made in the court below. The motion to dismiss will not be granted, but a motion suggesting a diminution of the record will be sustained and the cause remitted for correction. *Ib.*















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